

Criminal Law and Procedure Manual

2004

Supplement

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Defendant can be convicted of both Armed Robbery and Bank Robbery where both statutes were violated in the same incident.

People v Ford, C/A No. 246136 (June 15, 2004)

Defendant invaded the victim's home, repeatedly threatened to shoot or kill the victim, forced the victim into his basement to open a safe from which defendant removed and escaped with a shotgun, a loaded .38 caliber pistol, and \$2,980 in cash. Before leaving with the stolen property, defendant forced the victim to lie face-down, put his foot on the victim's back, and with the gun pressed to the victim's back, again threatened to kill the victim should he get up. A jury found defendant guilty of armed robbery, bank, safe or vault robbery, first-degree home invasion, and possession of a firearm in the commission of a felony.

Defendant argued that his convictions for both armed robbery and safe robbery violate federal or Michigan constitutional double jeopardy prohibitions against multiple punishment for the "same offense".

Held- "there is no violation of double jeopardy protections if one crime is complete before the other takes place, even if the offenses share common elements or one constitutes a lesser offense of the other." When defendant threatened to shoot the victim if he didn't go to the basement and open the safe, the offense of bank, safe or vault robbery was complete. The offense of armed robbery was not complete until the victim, after further threats of death by gunshot, opened the safe, and defendant took from it in the victim's presence. (W)e conclude that the Legislature intended to permit an offender to be convicted and sentenced for violating both MCL 750.729 and MCL 750.531 where proofs at a single trial disclose both statutes were violated during the same incident.

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Aiding and Abetting

People v Moore/People v Harris Sup Ct No. 120543 & No. 119862

In these two cases, defendants were convicted of felony-firearm under an aiding and abetting theory. In the first case Moore and his friend, Dejuan Boylston, argued with Jacky Hamilton and his brother, Johnny Hamilton. Shortly thereafter, Moore and Boylston approached the Hamilton brothers while they were fishing at a lake. Boylston was carrying a gun, Moore told the two brothers that they had better start swimming out into the lake. Boylston then recognized Johnny Hamilton from basketball games in the neighborhood. This recognition prompted Boylston to retreat, telling Moore that he did not want any trouble with the Hamiltons. After Boylston declined to shoot the brothers, Moore attempted to grab the gun from Boylston. During this time, Moore made derogatory statements to Boylston to encourage him to shoot the victims. After walking about halfway up the hill, Boylston turned and fired, hitting Jacky, who later died from gunshot wounds.

In the second case defendant Harris drove Mays to a gasoline station. Mays had a sawed-off shotgun in the vehicle. While robbing the gas station, Mays pointed the gun at the clerk and Harris approached a customer from behind and proceeded to remove the customer's wallet and other items from his pockets. The clerk refused to give Mays any money and pushed a button that locked the cash register. Although Harris repeatedly directed Mays to "pop", or shoot the clerk after he locked the register, the two men left the store without physically harming either the clerk or the customer.

Each defendant argued that his conviction for felony-firearm under an aiding and abetting theory should be reversed because he did not assist in either *obtaining* or *retaining* possession of the firearm.

HELD – Under the statute, the proper standard for establishing felony-firearm under an aiding and abetting theory is whether the defendant’s words or deeds “procure[d], counsel[ed], aid[ed], or abet[ted]” another to carry or have in his possession a firearm during the commission or attempted commission of a felony-firearm offense.

Add to page 4-2
Aiding and Abetting

People v Bullis, C/A No. 242164 (June 29, 2004)

Defendant was convicted of felony murder under the theory of aiding and abetting. To prove this charge the prosecutor had to prove the following:

Defendant performed acts or gave encouragement that assisted the commission of the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of the predicate felony.

HELD - Aiding and abetting describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime. “Here, the evidence demonstrated that defendant and D-Mack forcefully entered the victim's home while D-Mack held the gun to the victim's head and that defendant and D-Mack walked the victim around the house at gunpoint while searching his home for valuables. The jury could infer that by performing these actions, defendant assisted D-Mack in perpetrating the murder.” As for the second element, that was also satisfied in the case where “defendant instigated the criminal transaction by going to D-Mack's house, inviting him to participate in the robbery, and encouraging D-Mack to use a dangerous weapon during the robbery.” The predicate felony in this case was felony murder.

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A person may not violate 750.81d even if the arrest is illegal.

People v Ventura, C/A No. 248064 (June 10, 2004)

An officer went to defendant's residence to investigate a complaint about a stolen handgun. The officer testified that he initially spoke with defendant and noticed an odor of alcohol coming from defendant's breath. The officer knew defendant was a minor and asked him if he would submit to a preliminary breath test. Defendant initially agreed, but then pulled away. The officer asked defendant to blow out a "nice strong breath" and the officer observed a strong odor of alcohol and believed he might be intoxicated or under the influence of alcohol. Based on the officer observations of defendant and the odor of alcohol on defendant's breath, he informed defendant that he was under arrest. The officer grabbed one of defendant's arms to place defendant in handcuffs, but defendant broke free of the officer's grasp. Defendant's sister jumped on the officer's back and started scratching and clawing at his face. After receiving assistance from other officers at the scene, the officer was finally able to get defendant handcuffed. No alcohol was discovered at the residence. The MIP charge was dismissed by the trial court holding that there was not sufficient evidence that the subject was in possession of alcoholic liquor. The trial court then held that since the arrest was unlawful the subject could resist an unlawful arrest. The Court of Appeals disagreed.

HELD - On May 9, 2002, MCL 750.81d was enacted. It states in relevant part: (1) Except as provided in subsections (2), (3), and (4), an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than \$2,000.00, or both. The language of MCL 750.81d is abundantly clear and states only that an individual who resists a person the individual knows or has reason to know is performing his or her duties is guilty of a felony. A

person may not use force to resist an arrest made by one he knows or has reason to know is performing his duties regardless of whether the arrest is illegal when charged pursuant to MCL 750.81d. MCL 750.81d does not require a showing that defendant's arrest was lawful.

Add to page 4-7

The new R and O statute is constitutional

People v Nichols, C/A No. 248102 (June 15, 2004)

After being dispatched to a call, an officer encountered defendant in the middle of a road yelling and screaming. The officer was dressed in his police uniform and his police car was a fully marked patrol vehicle. The officer stopped his car in the middle of the roadway, turned on the red and blue overhead lights, and positioned the spotlight directly on defendant. At this point defendant was standing with his back to the officer directly in front of the police vehicle yelling and making hand gestures. The officer surveyed the scene and did not see anyone else around defendant. The officer exited his vehicle, yelled at defendant in an attempt to get his attention, and tried to make eye contact with defendant.

Defendant continued yelling, and walked toward the passenger side of the police car and then behind the vehicle but did not look at the officer. The officer turned around and walked to defendant. As the officer raised his hand in an attempt to keep defendant at a safe distance, defendant, who was sweating, and screaming in a high-pitched voice, looked at the officer with wide, dilated eyes. Defendant swung at the officer hand and yelled 'I'm going to die first.' The officer loudly commanded defendant to calm down and relax. Defendant pushed the officer, hit is vest, started kicking, and ran away while screaming expletives directed at the officer. The officer pursued defendant for approximately two blocks, grabbed defendant, and got him under control. Defendant continued to push, pull, kick, scream, and bite. A wrestling match ensued until back-up arrived and another officer assisted in subduing defendant. However, the officers were unable to control defendant well enough to handcuff him until a third officer arrived and assisted in apprehending defendant. Throughout this time the officers were repeatedly verbally commanding defendant to calm down and stop resisting. Defendant continued to resist and kick at the officers as he was taken into custody. There was evidence admitted at trial that at certain points during the mêlée defendant appeared to be in full possession of his faculties." It was later determined that defendant was under the influence of controlled substances and he stated he did not remember anything of his arrest.

HELD – Defendant claimed that the new R and O statute under MCL 750.81d was unconstitutional due to the phrase, "knows or has reason to know". The Court of Appeals disagreed and stated the phrase is not overly vague. He argued that since he was so "out of it" he could not have known the person he was resisting was a police officer. "Our review of the evidence reveals that defendant hit, pushed, pulled, and kicked police officers after he saw police officers in full uniform and fully marked police vehicles with lights and flashers engaged. Defendant also heard their loud and persistent commands and warnings, but rather than submitting, aggressively came into physical contact with one officer and then ran for almost two blocks before he was apprehended. When he was being subdued, defendant continued to violently fight and even bite despite numerous warnings and stun techniques. When examining the statute at issue in light of defendant's deliberate actions, we conclude this statute is not unconstitutionally vague."

Definition of serious injury for 750.81d

People v Thomas, C/A No. 245668 (July 13, 2004)

During a traffic stop, a subject tried to drive away from an officer. The officer reached inside the car in an attempt to stop him. The officers arm became entangled into the steering wheel. The vehicle took off and the officer was pulled along side the car for some distance. The officer eventually fell off and struck his head on a curb. In addition to various scrapes, bruises, and abrasions, the officer's left knee was sprained and a spinal vertebral bone in his neck was broken. The sprain to the left leg was described by the officer's treating physician as "severe." The officer was unable to walk without crutches for several weeks and missed approximately two and a half months of work. However, the treating physician opined that the leg injury was completely healed at the time of defendant's trial. The bone that was broken in the officer's neck

did not involve any nerve components and thus, fortunately, the extreme injuries that could have occurred (paralysis or death) did not result. However, the treating physician testified that there was a fifty-fifty possibility that future problems could develop as a result of the broken vertebral bone. The driver was charged with resisting an officer causing serious injury. He argued on appeal that the officer did not suffer serious injury. The Court of Appeals disagreed.

HELD – “At issue here is whether defendant caused a “serious impairment of a body function” as required by this section. MCL 750.81d(7)(c) specifies that this term is to be defined as it is in MCL 257.58c, which provides:

“Serious impairment of a body function” includes, but is not limited to, 1 or more of the following:

- (a) Loss of a limb or loss of use of a limb.
- (b) Loss of a foot, hand, finger, or thumb or loss of use of a foot, hand, finger or thumb.
- (c) Loss of an eye or ear or loss of use of an eye or ear.
- (d) Loss or substantial impairment of a bodily function.
- (e) Serious visible disfigurement.
- (f) A comatose state that lasts for more than 3 days.
- (g) Measurable brain or mental impairment.
- (h) A skull fracture or other serious bone fracture.
- (i) Subdural hemorrhage or subdural hematoma.
- (j) Loss of an organ.”

“We conclude that the trial court properly decided that the injury to the officer's left leg constituted a ‘serious impairment of a body function’ under the statute. The officer lost the use of that limb almost completely for several weeks while he was on crutches and, to a more limited extent, during the several months that he was unable to return to work. This impairment was certainly less extreme than what would have been the case had the officer been rendered comatose. But it was far more long lasting than the three days that would have been sufficient had a comatose state resulted. We conclude that this lesser impairment, itself within the statutory list, suffered for a much greater time than required for a more serious injury within the list, is properly considered as falling within the ‘serious impairment’ category. With respect to the officer's broken neck bone, we note that the statutory listing includes ‘a skull fracture or other serious bone fracture.’ Further, hemorrhages or hematomas that are “subdural” are listed as constituting serious impairments. MCL 257.58c(i). Such a “subdural” injury is one that is “located or occurring beneath the dura mater” which is, in turn, defined as the membrane “that covers the brain and the spinal cord.” Thus, the statutory listing considers any hemorrhage or hematoma that involves the spinal cord to be a “serious impairment.” We conclude that this same special status should be afforded bone fractures if they involve the spinal cord; any vertebral bone fracture is properly considered a “serious impairment of a body function” under the statute.

Add to page 4-10

Child abuse in the first degree requires specific intent

People v Maynor, MSC No. 123760 (June 29, 2004)

Defendant left her two children in her car while she visited a beauty salon. The children were belted in their seats, and defendant's car was parked some distance from the salon, in an unshaded, asphalt parking lot. The temperature that day was in the eighties. The child-safety locks on the car were engaged, and the driver's side window and possibly a rear window were rolled down 1 to 1 1/2 inches. During her appointment, which lasted approximately 3 1/2 hours, defendant had her hair washed, relaxed, and styled. She also had a sit-up massage, tried on a sundress, and purchased a snack. Defendant did not mention the children to anyone in the salon and never left the salon to check on the children. When defendant returned to her car after the appointment, her children were dead. She was charged with felony murder with the underlying felony being first degree child abuse. She argued on appeal that the charges should be dropped because she did not intend to cause serious physical injury to the children.

HELD – “We hold that, pursuant to the current language of the statute, first-degree child abuse requires the prosecution to establish, and the jury to be instructed that to convict it must find, not only that defendant

intended to commit the act, but also that defendant intended to cause serious physical harm or knew that serious physical harm would be caused by her act.” The case was remanded to the trial court to determine if the under the facts the defendant was guilty of child abuse in the first degree and thus felony murder.

Add to page 4-11

New law prohibits video taping in movie theaters.

P.A. 423 of 2004 (March 15, 2005)

750.465a. (1) A person who knowingly operates an audiovisual recording function of a device in a theatrical facility where a motion picture is being exhibited without the consent of the owner or lessee of that theatrical facility and of the licensor of the motion picture being exhibited is guilty of a crime as follows:

(a) Except as provided in subdivisions (b) and (c), the person is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than \$10,000.00, or both.

(b) If the person has 1 prior conviction for violating this subsection, the person is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than \$20,000.00, or both.

(c) If the person has 2 or more prior convictions for violating this subsection, the person is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than \$40,000.00, or both.

(2) This section does not prevent any lawfully authorized investigative, law enforcement, protective, or intelligence-gathering employee or agent, of this state or the United States, from operating the audiovisual recording function of a device in a theatrical facility where a motion picture is being exhibited as part of an investigative, protective, law enforcement, or intelligence-gathering activity.

(3) This section does not prohibit a person from being charged with, convicted of, or punished for any other violation of law that proscribes conduct described in this section and that provides a greater penalty.

(4) As used in this section:

(a) "Audiovisual recording function" means the capability of a device to record or transmit a motion picture or any part of a motion picture by technological means.

(b) "Theatrical facility" means a facility being used to exhibit a motion picture to the public, but does not include an individual's residence or a retail establishment.

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Definition of “child abuse” under MCL 722.622(e)

People v Beardsley and Wojcik C/A No. 246202 Aug. 24, 2004

Under the Failure to Report Child Abuse statute (MCL 722.622(e)), the definition of “child abuse” means that mandated reporters are only required to report child abuse – which includes nonaccidental physical or mental injury, sexual abuse, sexual exploitation, or maltreatment- when the suspected perpetrator is a parent, legal guardian, teacher, teacher’s aide, or other person responsible for the child’s health and welfare.

Add to page 4-29

New Unarmed Robbery statute

750.530 Larceny of money or other property; felony; penalty; “in the course of committing a larceny” defined.

Sec. 530.

(1) A person who, in the course of committing a larceny of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years.

(2) As used in this section, “in the course of committing a larceny” includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property.

Add to page 4-30

New Armed Robbery statute

750.529 Use or possession of dangerous weapon; aggravated assault; penalty.

Sec. 529.

A person who engages in conduct proscribed under section 530 and who in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon, is guilty of a felony punishable by imprisonment for life or for any term of years. If an aggravated assault or serious injury is inflicted by any person while violating this section, the person shall be sentenced to a minimum term of imprisonment of not less than 2 years.

Add to page 4-30

New Carjacking statute

750.529a Carjacking; felony; penalty; “in the course of committing a larceny of a motor vehicle” defined; consecutive sentence.

Sec. 529a.

(1) A person who in the course of committing a larceny of a motor vehicle uses force or violence or the threat of force or violence, or who puts in fear any operator, passenger, or person in lawful possession of the motor vehicle, or any person lawfully attempting to recover the motor vehicle, is guilty of carjacking, a felony punishable by imprisonment for life or for any term of years.

As used in this section, “in the course of committing a larceny of a motor vehicle” includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the motor vehicle.

Add to page 4-29

Public Act 111 of 2004 (Effective: 08/18/2004)

“Garret’s Law”

750.411t.added Hazing prohibited; violation; penalty; exceptions; certain defenses barred; definitions; section title.

Sec. 411t.

(1) Except as provided in subsection (4), a person who attends, is employed by, or is a volunteer of an educational institution shall not engage in or participate in the hazing of an individual.

(2) A person who violates subsection (1) is guilty of a crime punishable as follows:

(a) If the violation results in physical injury, the person is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$1,000.00, or both.

(b) If the violation results in serious impairment of a body function, the person is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than \$2,500.00, or both.

(c) If the violation results in death, the person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than \$10,000.00, or both.

(3) A criminal penalty provided for under this section may be imposed in addition to any penalty that may be imposed for any other criminal offense arising from the same conduct.

(4) This section does not apply to an individual who is the subject of the hazing, regardless of whether the individual voluntarily allowed himself or herself to be hazed.

(5) This section does not apply to an activity that is normal and customary in an athletic, physical education, military training, or similar program sanctioned by the educational institution.

(6) It is not a defense to a prosecution for a crime under this section that the individual against whom the hazing was directed consented to or acquiesced in the hazing.

(7) As used in this section:

(a) “Educational institution” means a public or private school that is a middle school, junior high school, high school, vocational school, college, or university located in this state.

(b) “Hazing” means an intentional, knowing, or reckless act by a person acting alone or acting with others that is directed against an individual and that the person knew or should have known endangers the physical health or safety of the individual, and that is done for the purpose of pledging,

being initiated into, affiliating with, participating in, holding office in, or maintaining membership in any organization. Subject to subsection (5), hazing includes any of the following that is done for such a purpose:

- (i) Physical brutality, such as whipping, beating, striking, branding, electronic shocking, placing of a harmful substance on the body, or similar activity.
- (ii) Physical activity, such as sleep deprivation, exposure to the elements, confinement in a small space, or calisthenics, that subjects the other person to an unreasonable risk of harm or that adversely affects the physical health or safety of the individual.
- (iii) Activity involving consumption of a food, liquid, alcoholic beverage, liquor, drug, or other substance that subjects the individual to an unreasonable risk of harm or that adversely affects the physical health or safety of the individual.
- (iv) Activity that induces, causes, or requires an individual to perform a duty or task that involves the commission of a crime or an act of hazing.
- (c) "Organization" means a fraternity, sorority, association, corporation, order, society, corps, cooperative, club, service group, social group, athletic team, or similar group whose members are primarily students at an educational institution.
- (d) "Pledge" means an individual who has been accepted by, is considering an offer of membership from, or is in the process of qualifying for membership in any organization.
- (e) "Pledging" means any action or activity related to becoming a member of an organization.
- (f) "Serious impairment of a body function" means that term as defined in section 479a.
- (8) This section shall be known and may be cited as "Garret's law".

Add to page 4-31

Act No. 156 Public Acts of 2004 (Effective: 09/01/04)

Eavesdropping statute rewritten

750.539d.amended Installation, placement, or use of device for observing, recording, transmitting, photographing or eavesdropping in private place.

Sec. 539d.

- (1) Except as otherwise provided in this section, a person shall not do either of the following:
 - (a) Install, place, or use in any private place, without the consent of the person or persons entitled to privacy in that place, any device for observing, recording, transmitting, photographing, or eavesdropping upon the sounds or events in that place.
 - (b) Distribute, disseminate, or transmit for access by any other person a recording, photograph, or visual image the person knows or has reason to know was obtained in violation of this section.
- (2) This section does not prohibit security monitoring in a residence if conducted by or at the direction of the owner or principal occupant of that residence unless conducted for a lewd or lascivious purpose.**
- (3) A person who violates or attempts to violate this section is guilty of a crime as follows:
 - (a) For a violation or attempted violation of subsection (1)(a):
 - (i) Except as provided in subparagraph (ii), the person is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than \$2,000.00, or both.
 - (ii) If the person was previously convicted of violating or attempting to violate this section, the person is guilty of a felony punishable by imprisonment for not more than **5 years** or a fine of not more than \$5,000.00, or both.
 - (b) For a violation or attempted violation of subsection (1)(b), the person is guilty of a felony punishable by imprisonment for not more than **5 years** or a fine of not more than \$5,000.00, or both.
- (4) This section does not prohibit a person from being charged with, convicted of, or punished for any other violation of law committed by that person while violating or attempting to violate subsection (1)(a) or (b).

Add to page 4-31

Act No. 155 Public Acts of 2004 (Effective: 09/01/04)

750.539j.added Surveillance of or distribution, dissemination, or transmission of recording, photograph, or visual image of individual having reasonable expectation of privacy; prohibited conduct; violation as felony; penalty; exceptions; "surveil" defined.

Sec. 539j.

(1) A person shall not do any of the following:

(a) Surveil another individual who is clad only in his or her undergarments, the unclad genitalia or buttocks of another individual, or the unclad breasts of a female individual under circumstances in which the individual would have a reasonable expectation of privacy.

(b) Photograph, or otherwise capture or record, the visual image of the undergarments worn by another individual, the unclad genitalia or buttocks of another individual, or the unclad breasts of a female individual under circumstances in which the individual would have a reasonable expectation of privacy.

(c) Distribute, disseminate, or transmit for access by any other person a recording, photograph, or visual image the person knows or has reason to know was obtained in violation of this section.

(2) A person who violates or attempts to violate this section is guilty of a crime as follows:

(a) For a violation or attempted violation of subsection (1)(a):

(i) Except as provided in subparagraph (ii), the person is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than \$2,000.00, or both.

(ii) If the person was previously convicted of violating or attempting to violate subsection (1)(a), the person is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than \$5,000.00, or both.

(b) For a violation or attempted violation of subsection (1)(b) or (c), the person is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than \$5,000.00, or both.

(3) This section does not prohibit a person from being charged with, convicted of, or punished for any other violation of law committed by that person while violating or attempting to violate subsection (1)(a) to (c).

(4) This section does not prohibit security monitoring in a residence if conducted by or at the direction of the owner or principal occupant of that residence unless conducted for a lewd or lascivious purpose.

(5) This section does not apply to a peace officer of this state or of the federal government, or the officer's agent, while in the performance of the officer's duties.

(6) As used in this section, "surveil" means to subject an individual to surveillance as that term is defined in section 539a.

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Identity Protection Act

Public Act No. 452 of 2004 – March 1, 2005

Sec. 1. This act shall be known and may be cited as the "identity theft protection act".

Sec. 3. As used in this act:

(a) "Child or spousal support" means support for a child or spouse, paid or provided pursuant to state or federal law under a court order or judgment. Support includes, but is not limited to, any of the following:

(i) Expenses for day-to-day care.

(ii) Medical, dental, or other health care.

(iii) Child care expenses.

(iv) Educational expenses.

(v) Expenses in connection with pregnancy or confinement under the paternity act, 1956 PA 205, MCL 722.711 to 722.730.

(vi) Repayment of genetic testing expenses, under the paternity act, 1956 PA 205, MCL 722.711 to 722.730.

(vii) A surcharge as provided by section 3a of the support and parenting time enforcement act, 1982 PA 295, MCL 552.603a.

(b) "Credit card" means that term as defined in section 157m of the Michigan penal code, 1931 PA 328, MCL 750.157m.

(c) "Depository institution" means a state or nationally chartered bank or a state or federally chartered savings and loan association, savings bank, or credit union.

(d) "Financial institution" means a depository institution, an affiliate of a depository institution, a licensee under the consumer financial services act, 1988 PA 161, MCL 487.2051 to 487.2072, 1984 PA 379, MCL 493.101 to 493.114, the motor vehicle sales finance act, 1950 (Ex Sess) PA 27, MCL 492.101 to 492.141,

the secondary mortgage loan act, 1981 PA 125, MCL 493.51 to 493.81, the mortgage brokers, lenders, and servicers licensing act, 1987 PA 173, MCL 445.1651 to 445.1684, or the regulatory loan act, 1939 PA 21, MCL 493.1 to 493.24, a seller under the home improvement finance act, 1965 PA 332, MCL 445.1101 to 445.1431, or the retail installment sales act, 1966 PA 224, MCL 445.851 to 445.873, or a person subject to subtitle A of title V of the Gramm-Leach-Bliley act, 15 USC 6801 to 6809.

(e) "Financial transaction device" means that term as defined in section 157m of the Michigan penal code, 1931 PA328, MCL 750.157m.

(f) "Identity theft" means engaging in an act or conduct prohibited in section 5(1).

(g) "Law enforcement agency" means that term as defined in section 2804 of the public health code, 1978 PA 368, MCL 333.2804.

(h) "Local registrar" means that term as defined in section 2804 of the public health code, 1978 PA 368, MCL 333.2804.

(i) "Medical records or information" includes, but is not limited to, medical and mental health histories, reports, summaries, diagnoses and prognoses, treatment and medication information, notes, entries, and x-rays and other imaging records.

(j) "Person" means an individual, partnership, corporation, limited liability company, association, or other legal entity.

(k) "Personal identifying information" means a name, number, or other information that is used for the purpose of identifying a specific person or providing access to a person's financial accounts, including, but not limited to, a person's name, address, telephone number, driver license or state personal identification card number, social security number, place of employment, employee identification number, employer or taxpayer identification number, government passport number, health insurance identification number, mother's maiden name, demand deposit account number, savings account number, financial transaction device account number or the person's account password, stock or other security certificate or account number, credit card number, vital record, or medical records or information.

(l) "State registrar" means that term as defined in section 2805 of the public health code, 1978 PA 368, MCL333.2805.

(m) "Trade or commerce" means that term as defined in section 2 of the Michigan consumer protection act, 1971 PA331, MCL 445.902.

(n) "Vital record" means that term as defined in section 2805 of the public health code, 1978 PA 368, MCL 333.2805.

Sec. 5. (1) A person shall not do any of the following:

(a) With intent to defraud or violate the law, use or attempt to use the personal identifying information of another person to do either of the following:

(i) Obtain credit, goods, services, money, property, a vital record, medical records or information, or employment.

(ii) Commit another unlawful act.

(b) By concealing, withholding, or misrepresenting the person's identity, use or attempt to use the personal identifying information of another person to do either of the following:

(i) Obtain credit, goods, services, money, property, a vital record, medical records or information, or employment.

(ii) Commit another unlawful act.

(2) A person who violates subsection (1)(b)(i) may assert 1 or more of the following as a defense in a civil action or as an affirmative defense in a criminal prosecution, and has the burden of proof on that defense by a preponderance of the evidence:

(a) That the person gave a bona fide gift for or for the benefit or control of, or use or consumption by, the person whose personal identifying information was used.

(b) That the person acted in otherwise lawful pursuit or enforcement of a person's legal rights, including an investigation of a crime or an audit, collection, investigation, or transfer of a debt, child or spousal support obligation, tax liability, claim, receivable, account, or interest in a receivable or account.

(c) That the action taken was authorized or required by state or federal law, rule, regulation, or court order or rule.

(d) That the person acted with the consent of the person whose personal identifying information was used, unless the person giving consent knows that the information will be used to commit an unlawful act.

Sec. 7. A person shall not do any of the following:

- (a) Obtain or possess, or attempt to obtain or possess, personal identifying information of another person with the intent to use that information to commit identity theft or another crime.**
- (b) Sell or transfer, or attempt to sell or transfer, personal identifying information of another person if the person knows or has reason to know that the specific intended recipient will use, attempt to use, or further transfer the information to another person for the purpose of committing identity theft or another crime.**
- (c) Falsify a police report of identity theft, or knowingly create, possess, or use a false police report of identity theft.**

Sec. 9. (1) Subject to subsection (6), a person who violates section 5 or 7 is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than \$25,000.00, or both.

(2) Sections 5 and 7 apply whether an individual who is a victim or intended victim of a violation of 1 of those sections is alive or deceased at the time of the violation.

(3) This section does not prohibit a person from being charged with, convicted of, or sentenced for any other violation of law committed by that person using information obtained in violation of this section or any other violation of law committed by that person while violating or attempting to violate this section.

(4) The court may order that a term of imprisonment imposed under this section be served consecutively to any term of imprisonment imposed for a conviction of any other violation of law committed by that person using the information obtained in violation of this section or any other violation of law committed by that person while violating or attempting to violate this section.

(5) A person may assert as a defense in a civil action or as an affirmative defense in a criminal prosecution for a violation of section 5 or 7, and has the burden of proof on that defense by a preponderance of the evidence, that the person lawfully transferred, obtained, or attempted to obtain personal identifying information of another person for the purpose of detecting, preventing, or deterring identity theft or another crime or the funding of a criminal activity.

(6) Subsection (1) does not apply to a violation of a statute or rule administered by a regulatory board, commission, or officer acting under authority of this state or the United States that confers primary jurisdiction on that regulatory board, commission, or officer to authorize, prohibit, or regulate the transactions and conduct of that person, including, but not limited to, a state or federal statute or rule governing a financial institution and the insurance code of 1956, 1956 PA 218, MCL 500.100 to 500.8302, if the act is committed by a person subject to and regulated by that statute or rule, or by another person who has contracted with that person to use personal identifying information.

Sec. 11. (1) A person shall not do any of the following in the conduct of trade or commerce:

(a) Deny credit or public utility service to or reduce the credit limit of a consumer solely because the consumer was a victim of identity theft, if the person had prior knowledge that the consumer was a victim of identity theft. A consumer is presumed to be a victim of identity theft for the purposes of this subdivision if he or she provides both of the following to the person:

(i) A copy of a police report evidencing the claim of the victim of identity theft.

(ii) Either a properly completed copy of a standardized affidavit of identity theft developed and made available by the federal trade commission pursuant to 15 USC 1681g or an affidavit of fact that is acceptable to the person for that purpose.

(b) Solicit to extend credit to a consumer who does not have an existing line of credit, or has not had or applied for a line of credit within the preceding year, through the use of an unsolicited check that includes personal identifying information other than the recipient's name, address, and a partial, encoded, or truncated personal identifying number. In addition to any other penalty or remedy under this act or the Michigan consumer protection act, 1976 PA 331, MCL 445.901 to 445.922, a credit card issuer, financial institution, or other lender that violates this subdivision, and not the consumer, is liable for the amount of the instrument if the instrument is used by an unauthorized user and for any fees assessed to the consumer if the instrument is dishonored.

(c) Solicit to extend credit to a consumer who does not have a current credit card, or has not had or applied for a credit card within the preceding year, through the use of an unsolicited credit card sent to the consumer. In addition to any other penalty or remedy under this act or the Michigan consumer protection act, 1976 PA 331, MCL 445.901 to 445.922, a credit card issuer, financial institution, or other lender that

violates this subdivision, and not the consumer, is liable for any charges if the credit card is used by an unauthorized user and for any interest or finance charges assessed to the consumer.

(d) Extend credit to a consumer without exercising reasonable procedures to verify the identity of that consumer. Compliance with regulations issued for depository institutions, and to be issued for other financial institutions, by the United States department of treasury under section 326 of the USA patriot act of 2001, 31 USC 5318, is considered compliance with this subdivision. This subdivision does not apply to a purchase of a credit obligation in an acquisition, merger, purchase of assets, or assumption of liabilities or any change to or review of an existing credit account.

(2) A person who knowingly or intentionally violates subsection (1) is guilty of a misdemeanor punishable by imprisonment for not more than 30 days or a fine of not more than \$1,000.00, or both. This subsection does not affect the availability of any civil remedy for a violation of this act, the Michigan consumer protection act, 1976 PA 331, MCL445.901 to 445.922, or any other state or federal law.

Sec. 13. (1) A law enforcement agency or victim of identity theft may verify information from a vital record from a local registrar or the state registrar in the manner described in section 2881(2) of the public health code, 1978 PA 368, MCL 333.2881.

(2) A state registrar or local registrar that verifies information from a vital record under section 2881(2) of the public health code, 1978 PA 368, MCL 333.2881, for a law enforcement agency investigating identity theft may provide that law enforcement agency with all of the following information about any previous requests concerning that public record that is available to the registrar:

- (a) Whether or not a certified copy or copies of the record were requested.
- (b) The date or dates a copy or copies of the record were issued.
- (c) The name of each applicant who requested the record.
- (d) The address, e-mail address, telephone number, and other identifying information of each applicant who requested the record.
- (e) Payment information regarding each request.

(3) A state registrar or local registrar that verifies information from a vital record under section 2881(2) of the public health code, 1978 PA 368, MCL 333.2881, for an individual who provides proof that he or she is a victim of identity theft may provide that individual with all of the following information about any previous requests concerning that public record that is available to the registrar:

- (a) Whether or not a certified copy or copies of the record were requested.
- (b) The date or dates a copy or copies of the record were issued.

(4) For purposes of subsection (3), it is sufficient proof that an individual is a victim of identity theft for a state registrar or local registrar to provide the information described in that subsection if he or she provides the registrar with a copy of a police report evidencing the claim that he or she is a victim of identity theft; and, if available, an affidavit of identity theft, in a form developed by the state registrar in cooperation with the attorney general for purposes of this subsection.

(5) A law enforcement agency may request an administrative use copy of a vital record from the state registrar in the manner described in section 2891 of the public health code, 1978 PA 368, MCL 333.2891.

(6) A law enforcement agency may request an administrative use copy of a vital record from a local registrar in the manner described in section 2891 of the public health code, 1978 PA 368, MCL 333.2891, if the request for the administrative use copy is in writing and contains both of the following:

- (a) A statement that the law enforcement agency requires information from a vital record beyond the information the local registrar may verify under subsections (1) and (2).
- (b) The agreement of the law enforcement agency that it will maintain the administrative use copy of the vital record in a secure location and will destroy the copy by confidential means when it no longer needs the copy.

Sec. 15. Section 285 of the Michigan penal code, 1931 PA 328, MCL 750.285, is repealed.

Venue for prosecution of identity theft PA 453 of 2004 (March 1, 2005)

(1) Conduct prohibited under former section 750.285 of the Michigan penal code or a violation of the identity theft protection act, or a violation of law committed in furtherance of or arising from the same transaction as conduct prohibited under former section 285 of the Michigan penal code, 1931 PA 328, or a violation of the identity theft protection act, may be prosecuted in 1 of the following jurisdictions:

- (a) The jurisdiction in which the offense occurred.
- (b) The jurisdiction in which the information used to commit the violation was illegally used.
- (c) The jurisdiction in which the victim resides.
- (2) If a person is charged with more than 1 violation of the identity theft protection act and those violations may be prosecuted in more than 1 jurisdiction, any of those jurisdictions is a proper jurisdiction for all of the violations.

Social Security Protection Act
Public Act 454 of 2004 – March 1, 2005

Sec. 1. This act shall be known and may be cited as the "social security number privacy act".

Sec. 2. As used in this act:

- (a) "Child or spousal support" means support for a child or spouse, paid or provided pursuant to state or federal law under a court order or judgment. Support includes, but is not limited to, any of the following:
 - (i) Expenses for day-to-day care.
 - (ii) Medical, dental, or other health care.
 - (iii) Child care expenses.
 - (iv) Educational expenses.
 - (v) Expenses in connection with pregnancy or confinement under the paternity act, 1956 PA 205, MCL 722.711 to 722.730.
 - (vi) Repayment of genetic testing expenses, under the paternity act, 1956 PA 205, MCL 722.711 to 722.730.
 - (vii) A surcharge paid under section 3a of the support and parenting time enforcement act, 1982 PA 295, MCL 552.603a.
- (b) "Computer", "computer network", or "computer system" mean those terms as defined in section 2 of 1979 PA 53, MCL 752.792.
- (c) "Internet" means that term as defined in 47 U.S.C. 230.
- (d) "Mailed" means delivered by United States mail or other delivery service that does not require the signature of recipient indicating actual receipt.
- (e) "Person" means an individual, partnership, limited liability company, association, corporation, public or nonpublic elementary or secondary school, trade school, vocational school, community or junior college, college, university, state or local governmental agency or department, or other legal entity.
- (d) "Publicly display" means to exhibit, hold up, post, or make visible or set out for open view, including, but not limited to, open view on a computer device, computer network, website, or other electronic medium or device, to members of the public or in a public manner. The term does not include conduct described in section 3(1)(b), (c), or (f).
- (e) "Title IV-D agency" means that term as defined in section 2 of the support and parenting time enforcement act, 1982 PA 295, MCL 552.602.
- (f) "Vital record" means that term as defined in section 2805 of the public health code, 1978 PA 368, MCL 333.2805.
- (g) "Website" means a collection of pages of the world wide web or internet, usually in HTML format, with clickable or hypertext links to enable navigation from one page or section to another, that often uses associated graphics files to provide illustration and may contain other clickable or hypertext links.

Sec. 3. (1) Except as provided in subsection (2), a person shall not intentionally do any of the following with the social security number of an employee, student, or other individual:

- (a) Publicly display all or more than 4 sequential digits of the social security number.
- (b) Subject to subsection (3), use all or more than 4 sequential digits of the social security number as the primary account number for an individual. However, if the person is using the social security number under subdivision (c) and as the primary account number on the effective date of this act, this subdivision does not apply to that person until January 1, 2006.
- (c) Visibly print all or more than 4 sequential digits of the social security number on any identification badge or card, membership card, or permit or license. However, if a person has implemented or implements a plan or schedule that establishes a specific date by which it will comply with this subdivision, this subdivision does not apply to that person until January 1, 2006, or the completion date specified in that plan or schedule, whichever is earlier.

- (d) Require an individual to use or transmit all or more than 4 sequential digits of his or her social security number over the internet or a computer system or network unless the connection is secure or the transmission is encrypted.
- (e) Require an individual to use or transmit all or more than 4 sequential digits of his or her social security number to gain access to an internet website or a computer system or network unless the connection is secure, the transmission is encrypted, or a password or other unique personal identification number or other authentication device is also required to gain access to the internet website or computer system or network.
- (f) Include all or more than 4 sequential digits of the social security number in or on any document or information mailed or otherwise sent to an individual if it is visible on or, without manipulation, from outside of the envelope or packaging.
- (g) Subject to subsection (3), beginning January 1, 2006, include all or more than 4 sequential digits of the social security number in any document or information mailed to a person, unless any of the following apply:
 - (i) State or federal law, rule, regulation, or court order or rule authorizes, permits, or requires that a social security number appear in the document.
 - (ii) The document is sent as part of an application or enrollment process initiated by the individual.
 - (iii) The document is sent to establish, confirm the status of, service, amend, or terminate an account, contract, policy, or employee or health insurance benefit or to confirm the accuracy of a social security number of an individual who has an account, contract, policy, or employee or health insurance benefit.
 - (iv) The document or information is mailed by a public body under any of the following circumstances:
 - (A) The document or information is a public record and is mailed in compliance with the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.
 - (B) The document or information is a copy of a public record filed or recorded with a county clerk or register of deeds office and is mailed by that office to a person entitled to receive that record.
 - (C) The document or information is a copy of a vital record recorded as provided by law and is mailed to a person entitled to receive that record.
 - (v) The document or information is mailed by or at the request of an individual whose social security number appears in the document or information or his or her parent or legal guardian.
 - (vi) The document or information is mailed in a manner or for a purpose consistent with subtitle A of title V of the Gramm-Leach-Bliley act, 15 USC 6801 to 6809; with the health insurance portability and accountability act of 1996, Public Law 104-191; or with section 537 or 539 of the insurance code of 1956, 1956 PA 218, MCL 500.537 and 500.539.
- (2) Subsection (1) does not apply to any of the following:
 - (a) A use of all or more than 4 sequential digits of a social security number that is authorized or required by state or federal statute, rule, or regulation, by court order or rule, or pursuant to legal discovery or process.
 - (b) A use of all or more than 4 sequential digits of a social security number by a title IV-D agency, law enforcement agency, court, or prosecutor as part of a criminal investigation or prosecution, or providing all or more than 4 sequential digits of a social security number to a title IV-D agency, law enforcement agency, court, or prosecutor as part of a criminal investigation or prosecution.
- (3) It is not a violation of subsection (1)(b) or (g) to use all or more than 4 sequential digits of a social security number if the use is any of the following:
 - (a) An administrative use of all or more than 4 sequential digits of the social security number in the ordinary course of business, by a person or a vendor or contractor of a person, to do any of the following:
 - (i) Verify an individual's identity, identify an individual, or do another similar administrative purpose related to an account, transaction, product, service, or employment or proposed account, transaction, product, service, or employment.
 - (ii) Investigate an individual's claim, credit, criminal, or driving history.
 - (iii) Detect, prevent, or deter identity theft or another crime.
 - (iv) Lawfully pursue or enforce a person's legal rights, including, but not limited to, an audit, collection, investigation, or transfer of a tax, employee benefit, debt, claim, receivable, or account or an interest in a receivable or account.
 - (v) Lawfully investigate, collect, or enforce a child or spousal support obligation or tax liability.
 - (vi) Provide or administer employee or health insurance or membership benefits, claims, or retirement programs or to administer the ownership of shares of stock or other investments.
 - (b) A use of all or more than 4 sequential digits of a social security number as a primary account number that meets both of the following:

- (i) The use began before the effective date of this act.
 - (ii) The use is ongoing, continuous, and in the ordinary course of business. If the use is stopped for any reason, this subdivision no longer applies.
- Sec. 4. (1) Beginning January 1, 2006, a person who obtains 1 or more social security numbers in the ordinary course of business shall create a privacy policy that does at least all of the following concerning the social security numbers the person possesses or obtains:
- (a) Ensures to the extent practicable the confidentiality of the social security numbers.
 - (b) Prohibits unlawful disclosure of the social security numbers.
 - (c) Limits who has access to information or documents that contain the social security numbers.
 - (d) Describes how to properly dispose of documents that contain the social security numbers.
 - (e) Establishes penalties for violation of the privacy policy.
- (2) A person that creates a privacy policy under subsection (1) shall publish the privacy policy in an employee handbook, in a procedures manual, or in 1 or more similar documents, which may be made available electronically.
- (3) This section does not apply to a person who possesses social security numbers in the ordinary course of business and in compliance with the fair credit reporting act, 15 USC 1681 to 1681v, or subtitle A of title V of the Gramm-Leach-Bliley act, 15 USC 6801 to 6809.
- Sec. 5. All or more than 4 sequential digits of a social security number contained in a public record are exempt from disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246, pursuant to section 13(1)(d) of the freedom of information act, 1976 PA 442, MCL 15.243.
- Sec. 6. (1) A person who violates section 3 with knowledge that the person's conduct violates this act is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$1,000.00, or both.**
- (2) An individual may bring a civil action against a person who violates section 3 and may recover actual damages. If the person knowingly violates section 3, an individual may recover actual damages or \$1,000.00, whichever is greater. If the person knowingly violates section 3, an individual may also recover reasonable attorney fees. Except for good cause, not later than 60 days before filing a civil action, an individual must make a written demand to the person for a violation of section 3 for the amount of his or her actual damages with reasonable documentation of the violation and the actual damages caused by the violation. This subsection does not apply to a person for conduct by an employee or agent of the person in violation of a privacy policy created pursuant to section 4 or in compliance with the fair credit reporting act, 15 USC 1681 to 1681v, or subtitle A of title V of the Gramm-Leach-Bliley act, 15 USC 6801 to 6809, if the person has taken reasonable measures to enforce its policy and to correct and prevent the reoccurrence of any known violations.
- Sec. 7. This act takes effect March 1, 2005.

Police report

Public Act 456 of 2004 – March 1, 2005

Changed MCL 780.751 to 780.834 by adding sections 4a, 33b, and 64a.

- Sec. 4a. (1) To facilitate compliance with 15 USC 1681g, a bona fide victim of identity theft is entitled to file a police report with a law enforcement agency in a jurisdiction where the alleged violation of identity theft may be prosecuted as provided under section 10c of chapter II of the code of criminal procedure, 1927 PA 175, MCL 762.10c, and to obtain a copy of that report from that law enforcement agency.
- (2) As used in this section, "identity theft" means that term as defined in section 3 of the identity theft protection act.

Public Act No. 458 of 2004 (March 1, 2005) (MCL 767.24) – State of Limitations

- (1) An indictment for murder, or criminal sexual conduct in the first degree, or a violation of chapter LXXXIII-A of the Michigan penal code, 1931 PA 328, MCL 750.543a to 750.543z, or a violation of chapter XXXIII of the Michigan penal code, 1931 PA 328, MCL 750.200 to 750.212a, that is punishable by life imprisonment may be found and filed at any time.

(2) An indictment for a violation or attempted violation of section 145c, 520c, 520d, 520e, or 520g of the Michigan penal code, 1931 PA 328, MCL 750.145c, 750.520c, 750.520d, 750.520e, and 750.520g, may be found and filed as follows:

(a) Except as otherwise provided in subdivision (b), an indictment may be found and filed within 10 years after the offense is committed or by the alleged victim's twenty-first birthday, whichever is later.

(b) If evidence of the violation is obtained and that evidence contains DNA that is determined to be from an unidentified individual, an indictment against that individual for the violation may be found and filed at any time after the offense is committed. However, after the individual is identified, the indictment may be found and filed within 10 years after the individual is identified or by the alleged victim's twenty-first birthday, whichever is later.

(c) As used in this subsection:

(i) "DNA" means human deoxyribonucleic acid.

(ii) "Identified" means the individual's legal name is known and he or she has been determined to be the source of the DNA.

(3) An indictment for kidnapping, extortion, assault with intent to commit murder, attempted murder, manslaughter, conspiracy to commit murder, or first-degree home invasion may be found and filed within 10 years after the offense is committed.

(4) An indictment for identity theft or attempted identity theft may be found and filed as follows:

(a) Except as otherwise provided in subdivision (b), an indictment may be found and filed within 6 years after the offense is committed.

(b) If evidence of the violation is obtained and the individual who committed the offense has not been identified, an indictment may be found and filed at any time after the offense is committed, but not more than 6 years after the individual is identified.

(c) As used in this subsection:

(i) "Identified" means the individual's legal name is known.

(ii) "Identity theft" means 1 or more of the following:

(A) Conduct prohibited in section 5 or 7 of the identity theft protection act, MCL 445.65 and 445.67.

(B) Conduct prohibited under former section 285 of the Michigan penal code, 1931 PA 328.

(5) All other indictments may be found and filed within 6 years after the offense is committed.

(6) Any period during which the party charged did not usually and publicly reside within this state is not part of the time within which the respective indictments may be found and filed.

(7) The extension or tolling, as applicable, of the limitations period provided in this section applies to any of those violations for which the limitations period has not expired at the time the extension or tolling takes effect.

Secretly capture someone's ID

Public Act 460 of 2004 – March 1, 2005 - MCL 750.539k.

(1) A person who is not a party to a transaction that involves the use of a financial transaction device shall not secretly or surreptitiously photograph, or otherwise capture or record, electronically or by any other means, or distribute, disseminate, or transmit, electronically or by any other means, personal identifying information from the transaction without the consent of the individual.

(2) This section does not prohibit the capture or transmission of personal identifying information in the ordinary and lawful course of business.

(3) This section does not apply to a peace officer of this state, or of the federal government, or the officer's agent, while in the lawful performance of the officer's duties.

(4) This section does not prohibit a person from being charged with, convicted of, or punished for any other violation of law committed by that person while violating or attempting to violate this section.

(5) A person who violates this section is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than \$1,000.00, or both.

(6) As used in this section:

(a) "Financial transaction device" means that term as defined in section 157m.

(b) "Personal identifying information" means that term as defined in section 3 of the identity theft protection act, MCL 445.63.

Add to page 5-4

Act No. 672 Public Acts of 2002

Unauthorized Use of an Automobile

Sec. 414. Any person who takes or uses without authority any motor vehicle without intent to steal the same, or who is a party to such unauthorized taking or using, is guilty of a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than \$1,500.00. However, in case of a first offense, the court may reduce the punishment to imprisonment for not more than 3 months or a fine of not more than \$ 500.00. However, **this section does not apply to any person or persons employed by the owner of said motor vehicle or anyone else**, who, by the nature of his or her employment, has the charge of or the authority to drive said motor vehicle if said motor vehicle is driven or used without the owner's knowledge or consent.

Add to page 5-19

Act No. 154 Public Acts of 2004 (Effective: 09/01/04)

False pretense defined for charge of False pretenses with intent to defraud

750.218.amended False pretenses with intent to defraud; violation; penalty; enhanced sentence based on prior convictions; "false pretense" defined.

Sec. 218.

(1) A person who, with the intent to defraud or cheat makes or uses a false pretense to do 1 or more of the following is guilty of a crime punishable as provided in this section:

- (a) Cause a person to grant, convey, assign, demise, lease, or mortgage land or an interest in land.
- (b) Obtain a person's signature on a forged written instrument.
- (c) Obtain from a person any money or personal property or the use of any instrument, facility, article, or other valuable thing or service.
- (d) By means of a false weight or measure obtain a larger amount or quantity of property than was bargained for.
- (e) By means of a false weight or measure sell or dispose of a smaller amount or quantity of property than was bargained for.

(2) If the land, interest in land, money, personal property, use of the instrument, facility, article, or valuable thing, service, larger amount obtained, or smaller amount sold or disposed of has a value of less than \$200.00, the person is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$500.00 or 3 times the value, whichever is greater, or both imprisonment and a fine.

(3) If any of the following apply, the person is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than \$2,000.00 or 3 times the value, whichever is greater, or both imprisonment and a fine:

(a) The land, interest in land, money, personal property, use of the instrument, facility, article, or valuable thing, service, larger amount obtained, or smaller amount sold or disposed of has a value of \$200.00 or more but less than \$1,000.00.

(b) The person violates subsection (2) and has 1 or more prior convictions for committing or attempting to commit an offense under this section or a local ordinance substantially corresponding to this section.

(4) If any of the following apply, the person is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than \$10,000.00 or 3 times the value, whichever is greater, or both imprisonment and a fine:

(a) The land, interest in land, money, personal property, use of the instrument, facility, article, or valuable thing, service, larger amount obtained, or smaller amount sold or disposed of has a value of \$1,000.00 or more but less than \$20,000.00.

(b) The person violates subsection (3)(a) and has 1 or more prior convictions for committing or attempting to commit an offense under this section. For purposes of this subdivision, however, a prior conviction does not include a conviction for a violation or attempted violation of subsection (2) or (3)(b).

(5) If any of the following apply, the person is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than \$15,000.00 or 3 times the value, whichever is greater, or both imprisonment and a fine:

(a) The land, interest in land, money, personal property, use of the instrument, facility, article, or valuable thing, service, larger amount obtained, or smaller amount sold or disposed of has a value of \$20,000.00 or more.

(b) The person violates subsection (4)(a) and has 2 or more prior convictions for committing or attempting to commit an offense under this section. For purposes of this subdivision, however, a prior conviction does not include a conviction for a violation or attempted violation of subsection (2) or (3)(b).

(6) The values of land, interest in land, money, personal property, use of the instrument, facility, article, or valuable thing, service, larger amount obtained, or smaller amount sold or disposed of in separate incidents pursuant to a scheme or course of conduct within any 12-month period may be aggregated to determine the total value involved in the violation of this section.

(9) As used in this section, "false pretense" includes, but is not limited to, a false or fraudulent representation, writing, communication, statement, or message, communicated by any means to another person, that the maker of the representation, writing, communication, statement, or message knows is false or fraudulent. The false pretense may be a representation regarding a past or existing fact or circumstance or a representation regarding the intention to perform a future event or to have a future event performed.

Add to page 6-12

Certain explosives prohibited

PA 523 of 2004 (Dec 30, 2004)

750. 211a. (1) A person shall not do either of the following:

(a) Except as provided in subdivision (b), manufacture, buy, sell, furnish, or possess a Molotov cocktail or any similar device.

(b) Manufacture, buy, sell, furnish, or possess any device that is designed to explode or that will explode upon impact or with the application of heat or a flame or that is highly incendiary, with the intent to frighten, terrorize, intimidate, threaten, harass, injure, or kill any person, or with the intent to damage or destroy any real or personal property without the permission of the property owner or, if the property is public property, without the permission of the governmental agency having authority over that property.

(2) A person who violates subsection (1) is guilty of a crime as follows:

(a) For a violation of subsection (1)(a), the person is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than \$2,000.00, or both.

(b) For a violation of subsection (1)(b) and except as provided in subdivisions (c) to (f), the person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than \$10,000.00, or both.

(c) If the violation damages the property of another person, the person is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than \$15,000.00, or both.

(d) If the violation causes physical injury to another individual, other than serious impairment of a body function, the person is guilty of a felony punishable by imprisonment for not more than 25 years or a fine of not more than \$20,000.00, or both.

(e) If the violation causes serious impairment of a body function to another individual, the person is guilty of a felony punishable by imprisonment for life or any term of years or a fine of not more than \$25,000.00, or both.

(f) If the violation causes the death of another individual, the person is guilty of a felony and shall be imprisoned for life without eligibility for parole and may be fined not more than \$40,000.00, or both.

(3) As used in this section, "Molotov cocktail" means an improvised incendiary device that is constructed from a bottle or other container filled with a flammable or combustible material or substance and that has a wick, fuse, or other device designed or intended to ignite the contents of the device when it is thrown or placed near a target.

Add to page 6-13
Obstruction by disguise

People v Gregory Dupree Jackson, C/A No. 245972 (July 6, 2004)

During a traffic stop, a driver had no identification on him but stated his name was “Frederick Darrell Jackson.” Later it was determined that the driver had lied about his identification and had given his brother’s name. The prosecutor charged the suspect with obstruction by disguise under MCL 750.217, which provides the following:

Any person who in any manner disguises himself or herself with intent to obstruct the due execution of the law, or with intent to intimidate, hinder or interrupt any officer or any other person in the legal performance of his or her duty, or the exercise of his or her rights under the constitution and laws of this state, whether such intent be effected or not, is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than \$1,000.00.

HELD – The court upheld a previous Court of Appeals decision that had stated that the word “disguise” includes an element of physical concealment. MCL 750.217 does not apply to the conduct of providing a false or fictitious name to a police officer.

Add to page 6-15
Taser law amended to include additional users
P.A. 338 of 2004 (September 23, 2004)

Sec. 224a. (1) Except as otherwise provided in this section, a person shall not sell, offer for sale, or possess in this state a portable device or weapon from which an electrical current, impulse, wave, or beam may be directed, which current, impulse, wave, or beam is designed to incapacitate temporarily, injure, or kill.

(2) This section does not prohibit any of the following:

(a) The possession and reasonable use of a device that uses electro-muscular disruption technology by a peace officer, an employee of the department of corrections authorized in writing by the director of the department of corrections, a local corrections officer authorized in writing by the county sheriff, a probation officer, a court officer, a bail agent authorized under section 167b, a licensed private investigator, or an aircraft pilot or aircraft crew member, who has been trained in the use, effects, and risks of the device, while performing his or her official duties.

(b) Possession solely for the purpose of delivering a device described in subsection (1) to any governmental agency or to a laboratory for testing, with the prior written approval of the governmental agency or law enforcement agency and under conditions determined to be appropriate by that agency.

(3) A manufacturer, authorized importer, or authorized dealer may demonstrate, offer for sale, hold for sale, sell, give, lend, or deliver a device that uses electro-muscular disruption technology to a person authorized to possess a device that uses electro-muscular disruption technology and may possess a device that uses electro-muscular disruption technology for any of those purposes.

(4) A person who violates this section is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than \$2,000.00, or both.

(5) As used in this section:

(a) "A device that uses electro-muscular disruption technology" means a device to which all of the following apply:

(i) The device is capable of creating an electro-muscular disruption and is used or intended to be used as a defensive device capable of temporarily incapacitating or immobilizing a person by the direction or emission of conducted energy.

(ii) The device contains an identification and tracking system that, when the device is initially used, dispenses coded material traceable to the purchaser through records kept by the manufacturer.

(iii) The manufacturer of the device has a policy of providing the identification and tracking information described in subparagraph (ii) to a police agency upon written request by that agency.

(b) "Local corrections officer" means that term as defined in section 2 of the local corrections officers training act, 2003 PA 125, MCL 791.532.

(c) "Peace officer" means any of the following:

(i) A police officer or public safety officer of this state or a political subdivision of this state, including motor carrier officers appointed under section 6d of 1935 PA 59, MCL 28.6d, and security personnel employed by the state under section 6c of 1935 PA 59, MCL 28.6c.

(ii) A sheriff or a sheriff's deputy.

(iii) A police officer or public safety officer of a junior college, college, or university who is authorized by the governing board of that junior college, college, or university to enforce state law and the rules and ordinances of that junior college, college, or university.

(iv) A township constable.

(v) A marshal of a city, village, or township.

(vi) A conservation officer of the department of natural resources or the department of environmental quality.

(vii) A law enforcement officer of another state or of a political subdivision of another state or a junior college, college, or university in another state, substantially corresponding to a law enforcement officer described in subparagraphs (i) to (vi).

(viii) A federal law enforcement officer.

Add to page 6-20

Federal law on CCW for police officers

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Law Enforcement Officers Safety Act of 2004'.

SEC. 2. EXEMPTION OF QUALIFIED LAW ENFORCEMENT OFFICERS FROM STATE LAWS PROHIBITING THE CARRYING OF CONCEALED FIREARMS.

(a) In General- Chapter 44 of title 18, United States Code, is amended by inserting after section 926A the following:

`Sec. 926B. Carrying of concealed firearms by qualified law enforcement officers

`(a) Notwithstanding any other provision of the law of any State or any political subdivision thereof, an individual who is a qualified law enforcement officer and who is carrying the identification required by subsection (d) may carry a concealed firearm that has been shipped or transported in interstate or foreign commerce, subject to subsection (b).

`(b) This section shall not be construed to supersede or limit the laws of any State that--

`(1) permit private persons or entities to prohibit or restrict the possession of concealed firearms on their property; or

`(2) prohibit or restrict the possession of firearms on any State or local government property, installation, building, base, or park.

`(c) As used in this section, the term 'qualified law enforcement officer' means an employee of a governmental agency who--

`(1) is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and has statutory powers of arrest;

`(2) is authorized by the agency to carry a firearm;

`(3) is not the subject of any disciplinary action by the agency;

`(4) meets standards, if any, established by the agency which require the employee to regularly qualify in the use of a firearm;

`(5) is not under the influence of alcohol or another intoxicating or hallucinatory drug or substance; and

`(6) is not prohibited by Federal law from receiving a firearm.

`(d) The identification required by this subsection is the photographic identification issued by the governmental agency for which the individual is employed as a law enforcement officer.

`(e) As used in this section, the term `firearm' does not include--

`(1) any machinegun (as defined in section 5845 of the National Firearms Act);

`(2) any firearm silencer (as defined in section 921 of this title); and

`(3) any destructive device (as defined in section 921 of this title).'

(b) Clerical Amendment- The table of sections for such chapter is amended by inserting after the item relating to section 926A the following:

`926B. Carrying of concealed firearms by qualified law enforcement officers.'

SEC. 3. EXEMPTION OF QUALIFIED RETIRED LAW ENFORCEMENT OFFICERS FROM STATE LAWS PROHIBITING THE CARRYING OF CONCEALED FIREARMS.

(a) In General- Chapter 44 of title 18, United States Code, is further amended by inserting after section 926B the following:

`Sec. 926C. Carrying of concealed firearms by qualified retired law enforcement officers

`(a) Notwithstanding any other provision of the law of any State or any political subdivision thereof, an individual who is a qualified retired law enforcement officer and who is carrying the identification required by subsection (d) may carry a concealed firearm that has been shipped or transported in interstate or foreign commerce, subject to subsection (b).

`(b) This section shall not be construed to supersede or limit the laws of any State that--

`(1) permit private persons or entities to prohibit or restrict the possession of concealed firearms on their property; or

`(2) prohibit or restrict the possession of firearms on any State or local government property, installation, building, base, or park.

`(c) As used in this section, the term `qualified retired law enforcement officer' means an individual who--

`(1) retired in good standing from service with a public agency as a law enforcement officer, other than for reasons of mental instability;

`(2) before such retirement, was authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and had statutory powers of arrest;

`(3)(A) before such retirement, was regularly employed as a law enforcement officer for an aggregate of 15 years or more; or

`(B) retired from service with such agency, after completing any applicable probationary period of such service, due to a service-connected disability, as determined by such agency;

`(4) has a nonforfeitable right to benefits under the retirement plan of the agency;

`(5) during the most recent 12-month period, has met, at the expense of the individual, the State's standards for training and qualification for active law enforcement officers to carry firearms;

`(6) is not under the influence of alcohol or another intoxicating or hallucinatory drug or substance; and

`(7) is not prohibited by Federal law from receiving a firearm.

`(d) The identification required by this subsection is--

`(1) a photographic identification issued by the agency from which the individual retired from service as a law enforcement officer that indicates that the individual has, not less recently than one year before the date the individual is carrying the concealed firearm, been tested or otherwise found by the agency to meet the standards established by the agency for training and qualification for active law enforcement officers to carry a firearm of the same type as the concealed firearm; or

`(2)(A) a photographic identification issued by the agency from which the individual retired from service as a law enforcement officer; and

`(B) a certification issued by the State in which the individual resides that indicates that the individual has, not less recently than one year before the date the individual is carrying the concealed firearm, been tested or otherwise found by the State to meet the standards established by the State for training and qualification for active law enforcement officers to carry a firearm of the same type as the concealed firearm.

`(e) As used in this section, the term `firearm' does not include--

`(1) any machinegun (as defined in section 5845 of the National Firearms Act);

`(2) any firearm silencer (as defined in section 921 of this title); and

`(3) a destructive device (as defined in section 921 of this title).'

(b) Clerical Amendment- The table of sections for such chapter is further amended by inserting after the item relating to section 926B the following:

`926C. Carrying of concealed firearms by qualified retired law enforcement officers.'

Add to page 6-22

The following does not apply to license to purchase (Effective 05/13/ 2004)

(h) Purchasing, owning, carrying, possessing, using, or transporting an antique firearm. As used in this subdivision, "antique firearm" means that term as defined in section 231a of the Michigan penal code, 1931 PA 328, MCL 750.231a.

(a) "Antique firearm" means either of the following:

(i) A firearm not designed or redesigned for using rimfire or conventional center fire ignition with fixed ammunition and manufactured in or before 1898, including a matchlock, flintlock, percussion cap, or similar type of ignition system or replica of such a firearm, whether actually manufactured before or after 1898.

(ii) A firearm using fixed ammunition manufactured in or before 1898, for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade.

Notification of teacher's convictions

MCL 380.1539b:

Not later than 15 days after the date of the conviction, the prosecuting attorney in charge of a case in which a person who holds a teaching certificate was convicted of a crime described in subsection (1) or (2) and the court that convicted the person shall notify the superintendent of public instruction, and any public school, school district, intermediate school district, or nonpublic school in which the person is employed, of that conviction, of the name and address of the person convicted, and of the sentence imposed on the

person. A prosecuting attorney in charge of a case in which a person is convicted of a crime described in subsection (1) or (2) and a court that convicts a person of a crime described in subsection (1) or (2) shall inquire whether the person holds a teaching certificate.

Applies to the following convictions:

- (a) Any felony.
- (b) Any of the following misdemeanors:
 - (i) Criminal sexual conduct in the fourth degree or an attempt to commit criminal sexual conduct in the fourth degree.
 - (ii) Child abuse in the third or fourth degree or an attempt to commit child abuse in the third or fourth degree.
 - (iii) A misdemeanor involving cruelty, torture, or indecent exposure involving a child.
 - (iv) A misdemeanor violation of section 7410 of the public health code, 1978 PA 368, MCL 333.7410.
 - (v) Assault, agg assault, illegal entry, allowing minors to consume alcohol at a social gathering, soliciting a child for immoral purpose, using the internet to commit a crime against a minor, stealing from a vacant building.
 - (vi) Furnishing alcohol to minor.

Add to page 6-27

Probation violation applies to felon in possession of firearms

People v Sessions, C/A No. 251836 (May 18, 2004)

Subject was arrested for domestic violence at his home. During the arrest, officers noticed a shot gun in the laundry room. The prosecutor subsequently charged the subject for being a felon in possession of a firearm. He argued on appeal that he did not violate the statute because it had been more than 3 years since the end of any imprisonment or successful completion of probation. The prosecutor agreed that it was three-year since he was placed off probation, but that he had violated probation during his probationary time and thus it had not been successfully completed and he could never possess a firearm. The Court of Appeals agreed and upheld the conviction.

Add to page 6-27

Larceny from person is a specific felony for felon in possession of firearm charges

People v Perkins, C/A No. 243412 (June 8, 2004)

Defendant was charged with being a felon in possession of a firearm with the underlying felony being larceny from a person. Under the felon in possession statute a subject cannot possess a firearm for three after most felonies or 5 years after specific felonies. For the specific felonies the subject was required to go to the gun board to get his rights restored. The court first held that there was no evidence presented that the defendant had his rights restored. The court also held that larceny from a person falls under the specific felony charge.

MCL 750.224f(6) states, "specified felony" means a felony in which 1 or more of the following circumstances exist:

- (i) An element of that felony is the use, attempted use, or threatened use of physical force against the person or property of another, *or that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.* We conclude that the offense of larceny from a person, *"by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."*

MCL 750.224f(6)(i). We therefore hold that larceny from a person is a specified felony within the meaning of MCL 750.224f.

Add to page 7-1

Urine can be a harmful substance under MCL 750.397a

People v Guthrie, C/A No. 245891 (June 15, 2004)

Defendant worked at a computer store that was next to a pet store. Every once in awhile the defendant would use the phone lines at the pet shop to test modems. One day, the owner of the pet shop notice that her phones lines were not working properly and went next door to complain. She found defendant sleeping in the back room. She woke him up to complain. The defendant became irate and told her he did not mess with the phone lines. She continued to complain and went to the store and thrashed around in an attempt to fix the lines and then left again. The victim left her store but when she returned the shop was filled with an overwhelming stench. It was later determined that defendant kept a two liter pop bottle full of stale urine for anyone who “disrespected” him. “During the cleanup, the victim absentmindedly took a partially rolled-up bag of pretzels from a six-foot shelf and popped one of the pretzels into her mouth. It was wet. She immediately knew that the suspect had placed urine in the pretzels and hysterically ran to the bathroom to wash out her mouth. According to her testimony, the urine-soaked pretzel made her ‘kind of sick, kind of real sick.’” He was charged under 750.397a, which prohibits placing harmful substances in food.

HELD: According to MCL 750.397(a), “a person who places a harmful substance in any food, with intent to harm the consumer of the food ... is guilty of a felony....” “The prosecution produced evidence that defendant exchanged heated words with the victim and kept a two-liter bottle filled with urine to ‘deal’ with people who disrespected him. The evidence also showed that defendant left the pretzels on a shelf where they were likely to be, and ultimately were, retrieved and consumed without the realization that they were contaminated. This evidence sufficed to support the inference that defendant intended to harm the victim.”

“Defendant next argues that the prosecution failed to present sufficient evidence to prove that the substance on the pretzels was urine. We disagree. An expert witness testified that creatinine and urea, two substances commonly found in urine, were found in the bag of pretzels. Other witnesses testified that the pretzels smelled of urine and defendant possessed urine for purposes of retaliation.”

“Finally, defendant argues that there was insufficient evidence presented to show that urine is a harmful substance. We disagree. An expert witness testified that urine can transmit disease through viruses or bacteria that it may contain. The witness also testified that the sample of urine from the pretzel bag contained bacteria. Therefore, a rational trier of fact could have found that the urine poured on the pretzels was a harmful substance.”

Add to page 7-18

Perjury does not require proof of materiality

People v Lively, MSC No. 123145 (June 16, 2004).

Defendant was charged with perjury after a statement made during a divorce proceeding. He argued that the statement was not material to the outcome as required by the statute. The Michigan Supreme Court reviewed the statute and held that there is no requirement for materiality as was previously held. “The plain language of our perjury state alters the common law and does not require proof of materiality.”

Add to page 7-25

Litter includes abandoned vehicles – P.A. 494 of 2004 (December 29, 2004)

Sec. 8901. As used in this part:

(a) "Litter" means rubbish, refuse, waste material, garbage, offal, paper, glass, cans, bottles, trash, debris, or other foreign substances or a vehicle that is considered abandoned under section 252a of the Michigan vehicle code, 1949 PA300, MCL 257.252a.

(b) "Public or private property or water" includes, but is not limited to, any of the following:

(i) The right-of-way of a road or highway, a body of water or watercourse, or the shore or beach of a body of water or watercourse, including the ice above the water.

(ii) A park, playground, building, refuge, or conservation or recreation area.

(iii) Residential or farm properties or timberlands.

(c) **"Vehicle" means a motor vehicle registered or required to be registered under the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923.**

(d) "Vessel" means a vessel registered under part 801.

Sec. 8904. (1) Except as provided in subsection (3) involving litter from a leased vehicle or leased vessel, in a proceeding for a violation of this part involving litter from a motor vehicle or vessel, proof that the particular vehicle or vessel described in the citation, complaint, or warrant was used in the violation, together with proof that the defendant named in the citation, complaint, or warrant was the registered owner of the vehicle or vessel at the time of the violation, gives rise to a rebuttable presumption that the registered owner of the vehicle or vessel was the driver of the vehicle or vessel at the time of the violation.

(2) There is a rebuttable presumption that the driver of a vehicle or vessel is responsible for litter that is thrown, dumped, deposited, placed, or left from the vehicle or vessel on public or private property or water.

(3) In a proceeding for a violation of this part involving litter from a leased motor vehicle or leased vessel, proof that the particular vehicle or vessel described in the citation, complaint, or warrant was used in the violation, together with proof that the defendant named in the citation, complaint, or warrant was the lessee of the vehicle or vessel at the time of the violation, gives rise to a rebuttable presumption that the lessee of the vehicle or vessel was the driver of the vehicle or vessel at the time of the violation.

(4) In a proceeding for a violation of this part involving litter consisting of an abandoned vehicle, proof that the particular vehicle described in the citation, complaint, or warrant was abandoned, and that the defendant named in the citation, complaint, or warrant was the titled owner or lessee of the vehicle at the time it was abandoned, gives rise to a rebuttable presumption that the defendant abandoned the vehicle.

Sec. 8905a. (1) A person who violates this part where the amount of the litter is less than 1 cubic foot in volume is responsible for a state civil infraction and is subject to a civil fine of not more than \$800.00.

(2) A person who violates this part where the amount of the litter is 1 cubic foot or more but less than 3 cubic feet in volume is responsible for a state civil infraction and is subject to a civil fine of not more than \$1,500.00.

(3) Except as provided in subsection (4), a person who violates this part where the amount of the litter is 3 cubic feet or more in volume is responsible for a state civil infraction and is subject to a civil fine of not more than \$2,500.00. A person found to have committed a violation described in this subsection in a subsequent proceeding is subject to a civil fine of not more than \$5,000.00.

(4) A person who violates this part where the litter consists of an abandoned vehicle is responsible for a state civil infraction and is subject to a civil fine of not less than \$500.00 or more than \$2,500.00. A person found to have committed a violation described in this subsection in a subsequent proceeding is subject to a civil fine of not less than \$1,000.00 or more than \$5,000.00. However, the court shall not order the payment of a fine unless the vehicle has been disposed of under section 252g of the Michigan vehicle code, 1949 PA 300, MCL 257.252g.

(5) A default in the payment of a civil fine or costs ordered under this part or an installment of the fine or costs may be remedied by any means authorized under the revised judicature act of 1961, 1961 PA 236, MCL 600.101 to 600.9947.

(6) This section does not apply to a violation of section 8903 or 8905.

Add to page 8-11

US Supreme Court in *Crawford* requires right to confrontation of witnesses.

People v Bell, C/A No. 209270 (October 7, 2005)

"In *Crawford*, the United States Supreme Court held that to admit testimonial evidence against a defendant, the declarant must be unavailable and the defendant must have had 'a prior opportunity for cross examination' of the declarant. The Court in *Crawford* overruled its previous opinion in *Ohio v. Roberts*, 448 U.S. 56 which held that such evidence could be admitted if it could be shown to be reliable. In *Crawford*, the Supreme Court reasoned that '[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.'"

HELD – “Here, Roberts was arrested and interrogated by the police in connection with this crime. During the course of this interrogation, Roberts gave a statement that implicated defendant. Therefore, this statement was clearly testimonial. Moreover, defendant did not have an opportunity to cross-examine Roberts, because Roberts chose to exercise his Fifth Amendment right not to testify at trial. Accordingly, the Supreme Court's decision in *Crawford* compels us to hold that the trial court's decision to admit Roberts' statement violated defendant's Confrontation Clause right to cross-examine witnesses against him.”

Add to 9-2

An officer's arrest is valid as long as there is probable cause to arrest even if the arrest is not what the officer intends at the time.

Devenpeck v Alford, SupCt No. 03-710 (Dec 13, 2004)

Believing that respondent was impersonating a police officer, petitioner Haner, a Washington State Patrol officer, pursued and pulled over respondent's vehicle. While questioning respondent at the scene, petitioner Devenpeck, Haner's supervisor, discovered that respondent was taping their conversation and arrested him for violating the State's Privacy Act. The state trial court subsequently dismissed the charge. Respondent then filed this suit in federal court, claiming, among other things, that his arrest violated the Fourth and Fourteenth Amendments. The District Court denied petitioners qualified immunity, and the case went to trial. The jury was instructed that respondent had to establish lack of probable cause to arrest, and that taping police at a traffic stop was not a crime in Washington. The jury found for petitioners. The Ninth Circuit reversed, based in part on its conclusion that petitioners could not have had probable cause to arrest. It rejected petitioners' claim that there was probable cause to arrest for impersonating and for obstructing a law enforcement officer, because those offenses were not “closely related” to the offense invoked by Devenpeck at the time of arrest.

Held:

1. A warrantless arrest by a law officer is reasonable under the Fourth Amendment if, given the facts known to the officer, there is probable cause to believe that a crime has been or is being committed. The Ninth Circuit's additional limitation—that the offense establishing probable cause must be “closely related” to, and based on the same conduct as, the offense the arresting officer identifies at the time of arrest—is inconsistent with this Court's precedent, which holds that an arresting officer's state of mind (except for facts that he knows) is irrelevant to probable cause. The “closely related offense” rule is also condemned by its perverse consequences: it will not eliminate sham arrests but will cause officers to cease providing reasons for arrest, or to cite every class of offense for which probable cause could conceivably exist.
2. This Court will not decide in the first instance whether petitioners lacked probable cause to arrest respondent for either obstructing or impersonating an officer because the Ninth Circuit, having found those offenses legally irrelevant, did not decide that question.

Add to Chapter 10

Evidence obtained in violation of Miranda does not automatically have to be suppressed if the confession was voluntarily made.

U.S. v Patane, SupCt No. 02-1183 (June 28, 2004)

Officers were investigating the defendant for a violation of a temporary restraining order. They also had information that he was a convicted felon and was illegally possessing a pistol. The officers proceeded to his home and arrested him for violating the restraining order. One officer attempted to advise him of his rights when the defendant interrupted, asserting that he knew his rights. The officer then asked about the pistol and defendant told him where it was. The pistol was retrieved and the defendant was indicted for possession of a firearm by a convicted felon in violation of federal law. He argued on appeal that the firearm should be suppressed as a violation of the Miranda warnings.

HELD - The United States Supreme Court held that:

(1) Failure to give suspect Miranda warnings does not require suppression of physical fruits of suspect's unwarned but voluntary statements;

(2) Officers' failure to give Miranda warnings in conjunction with restraining-order arrest did not require suppression of weapon at firearms trial, since weapon was recovered based on defendant's voluntary statement that he possessed it.

First confession without warning may taint second confession

Missouri v Seibert, SupCt No. 02-1371 (June 28, 2004)

The defendant, Seibert, feared charges of neglect when her son, afflicted with cerebral palsy, died in his sleep. She was present when two of her sons and their friends discussed burning her family's mobile home to conceal the circumstances of her son's death. Donald, an unrelated mentally ill 18-year-old living with the family, was left to die in the fire, in order to avoid the appearance that Seibert's son had been unattended. Five days later, the police arrested Seibert, but did not read her her rights under Miranda v. Arizona. At the police station, an officer questioned her for 30 to 40 minutes, obtaining a confession that the plan was for Donald to die in the fire. He then gave her a 20-minute break, returned to give her Miranda warnings, and obtained a signed waiver. He resumed questioning, confronting her prewarning statements and getting her to repeat the information. She moved to suppress both her prewarning and postwarning statements. The officer testified that he made a conscious decision to withhold Miranda warnings, question first, then give the warnings, and then repeat the question until he got the answer previously given.

HELD – The confession was suppressed. “Miranda warnings given mid-interrogation, after defendant gave unwarned confession, were ineffective, and thus confession repeated after warnings were given was inadmissible at trial.”

Add to Chapter 11

Right to counsel at Corporeal Identifications

People v Hickman MSC No. 122548 (July 20, 2004)

Officers responded to an armed robbery complaint and met with complainant who advised them that two men had robbed him. Complainant stated that one of the men, later identified as defendant, pointed the gun at his face while the other person took two radios and money from him. Complainant provided a description of the two men and the gun that had been used. An officer saw a subject fitting the description of the man with the gun. The subject, arrested after a short foot chase, was found to be in possession of one of the radios. Police also recovered a gun, matching the description of the weapon that had been pointed at complainant, that the subject had thrown away during the foot chase. Approximately ten minutes later, an officer took complainant to a police car in which defendant was being held. Complainant immediately identified defendant as the man with the gun.

Defendant made a motion to suppress the on-the-scene identification by the victim on the grounds that he was not represented by counsel at the time of the identification.

HELD: The Michigan Supreme Court overturned the “very strong evidence” rule established in *People v Turner* and held that the right to counsel attaches only to corporeal identifications conducted at or after the initiation of adversarial judicial proceedings. The Court stated that the on-the-scene identification in this case was made before the initiation of any adversarial judicial criminal proceeding; thus, counsel was not required.

Add to Chapter 13

Supreme Court hears case on shooting a fleeing vehicle.

Brosseau v Haugen Sup Ct No. 03-1261 (Dec. 13, 2004)

An officer radioed from down the street that a neighbor had seen a man in her backyard. Brosseau ran in that direction, and Haugen appeared. He ran past the front of his mother's house and then turned and ran into the driveway. With Brosseau still in pursuit, he jumped into the driver's side of the Jeep and closed and

locked the door. Brosseau believed that he was running to the Jeep to retrieve a weapon.

Brosseau arrived at the Jeep, pointed her gun at Haugen, and ordered him to get out of the vehicle. Haugen ignored her command and continued to look for the keys so he could get the Jeep started. Brosseau repeated her commands and hit the driver's side window several times with her handgun, which failed to deter Haugen. On the third or fourth try, the window shattered. Brosseau unsuccessfully attempted to grab the keys and struck Haugen on the head with the barrel and butt of her gun. Haugen, still undeterred, succeeded in starting the Jeep. As the Jeep started or shortly after it began to move, Brosseau jumped back and to the left. She fired one shot through the rear driver's side window at a forward angle, hitting Haugen in the back. She later explained that she shot Haugen because she was " 'fearful for the other officers on foot who she believed were in the immediate area, and for the occupied vehicles in Haugen's path and for any other citizens who might be in the area.' "

HELD - The United States Supreme Court held that it was not clearly established that the officer violated the Fourth Amendment's deadly-force standards by shooting the suspect as he fled in vehicle, given risk posed to persons in immediate area. The Supreme Court cited to previous cases where similar use of force was upheld as valid. The courts found no Fourth Amendment violation when an officer shot a fleeing suspect who presented a risk to others. Cole v. Bone, supra, at 1333 (holding the officer "had probable cause to believe that the truck posed an imminent threat of serious physical harm to innocent motorists as well as to the officers themselves"); Smith v. Freland, 954 F.2d, at 347 (noting "a car can be a deadly weapon" and holding the officer's decision to stop the car from possibly injuring others was reasonable). Smith is closer to this case. There, the officer and suspect engaged in a car chase, which appeared to be at an end when the officer cornered the suspect at the back of a dead-end residential street. The suspect, however, freed his car and began speeding down the street. At this point, the officer fired a shot, which killed the suspect. The court held the officer's decision was reasonable and thus did not violate the Fourth Amendment. It noted that the suspect, like Haugen here, 'had proven he would do almost anything to avoid capture' and that he posed a major threat to, among others, the officers at the end of the street.

These cases taken together undoubtedly show that this area is one in which the result depends very much on the facts of each case. None of them squarely governs the case here; they do suggest that Brosseau's actions fell in the " 'hazy border between excessive and acceptable force.' " The cases by no means "clearly establish" that Brosseau's conduct violated the Fourth Amendment and thus the judgment of the United States Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

Add to Chapter 14 **Probable Cause to arrest for OWI**

People v Stephen, C/A No. 251190 (June 1, 2004)

Responding to an anonymous call, a police officer discovered defendant asleep in his truck at the county fairgrounds. The truck was wedged on a parking log, with the tires barely touching the ground. Defendant was in the passenger seat covered by a sleeping bag, his head leaning over onto the passenger seat. The truck's engine was not running, the automatic transmission was in park, and the keys to the truck were inside defendant's pocket. The police officer awakened defendant, and observed that he smelled strongly of intoxicants, and was confused and unaware of his surroundings. Defendant explained that he had been at a bar earlier that evening, had too much to drink, and drove to the fairgrounds to sleep because he was too intoxicated to drive home. Defendant explained that he struck the parking log while trying to leave the fairgrounds, and that after unsuccessfully attempting to free the truck from the log, he turned off the engine and went to sleep. The police officer arrested defendant for OUIL and operating a vehicle with a restricted license.

HELD: The defendant argued that the arrest was illegal. The prosecutor argued that the arrest was valid because he was either operating the vehicle because there was a "risk of collision" or the alternative that an accident had occurred and the officer could make the arrest. The Court of Appeals upheld the arrest but on

neither one of the prosecutor arguments. Instead the Court utilized the officers arrest authority for 93-day misdemeanors.

“Here, defendant's arrest was clearly valid because a peace officer may arrest a person without a warrant if the officer has reasonable cause to believe a misdemeanor punishable by more than ninety-two days' imprisonment occurred, and reasonable cause to believe the person committed it. MCL 764.15(1)(d). This exception, which became effective on August 21, 2000, was not mentioned in either party's brief in this case but is applicable here because under MCL 257.625(a)(ii), operating a vehicle under the influence of intoxicating liquor as a first offense is a misdemeanor punishable by imprisonment for not more than ninety-three days. Therefore, whether an accident occurred or whether the accident exception of MCL 764.15(1)(h) applies is irrelevant. Further, an officer does not have to observe a defendant operating a vehicle for the defendant to be arrested and prosecuted for OUIL under this exception. In the instant case, the police officer had reasonable cause to arrest defendant. That is, he had reasonable cause to believe that the crime of OUIL had been committed, and that defendant committed it. Defendant admitted to the police officer that he drove on public roadways to the fairgrounds where he was arrested, to sleep off the effects of having too much to drink. According to defendant, he struck the parking log while attempting to leave the fairgrounds, and turned off the engine and went to sleep after he was unable to dislodge his truck. This distinguishes the present case from People v. Burton, 252 Mich.App 130, (2002) where the defendant did not go out on the roadway but was using his truck as a shelter, rather than a motor vehicle, in a parking lot. Defendant both looked and smelled intoxicated when the arresting officer arrived at the scene. The officer also administered field sobriety tests. Based on defendant's admissions and other evidence, the officer had reasonable cause to arrest defendant for OUIL, and the prosecutor is entitled to prosecute defendant on that charge.”

Add to page 17-3

Unreasonable use of force may result in liability

Solomon v Auburn Hills Police Department, No. 03-1707 (Sixth Circuit Court of Appeals) November 10, 2004

Solomon took her six children and several of their friends to see a movie. Because the children ranged in age from three to eighteen, Solomon planned to accompany the younger children to a G-rated movie and Solomon's eighteen-year-old son and his girlfriend planned to accompany the older children to an R-rated movie. Solomon explained this to the ticket seller when she purchased the tickets for the two movies. When her adult son attempted to enter the R-rated movie theater with the other children, the usher informed him that the children would not be allowed into the theater without a parent. Solomon then approached the usher and explained that she was the mother of several of the children and that they had permission to be in the R-rated movie, but she would be watching the G-rated movie with her younger children. The usher referred Solomon to customer relations. Solomon then explained her situation to the Theatre manager, who responded that Theatre policy required a parent or guardian to accompany minor children into an R-rated movie. Solomon left customer relations and walked with her younger children toward the movie theater showing the G-rated movie. Before she reached the theater entrance, another Theatre employee informed Solomon that the older children could not see the R-rated movie without her accompanying them. Even though Solomon did not want to take her young children to see an R-rated movie, she went into the R-rated movie theater as instructed by Theatre management.

After Solomon was seated in the R-rated movie theater, the Theatre security guards entered and informed Solomon that she had to leave because she had not purchased tickets for that particular movie. Solomon refused to leave because she was following the manager's instructions. Shortly thereafter, AHPD officers Miller and Raskin--both of whom were between 230 and 250 pounds and at least five-feet-eight-inches tall arrived. The officers entered the theater, found Solomon sitting with her three young children, and instructed Solomon to leave. After Solomon refused, Officer Miller told her that she was under arrest for trespassing. Officer Miller grabbed her arm to make her leave, and Solomon, pushing her foot against the seat in front of her, backed away from the officer. Officer Miller then informed her that she was under arrest for assaulting a police officer. At that point, Officer Raskin asked Solomon to speak with the police officers in the lobby and Solomon agreed. Solomon's children and their friends followed Solomon out of

the R-rated movie theater. When Solomon entered the hallway, she handed her toddler to her son's girlfriend, and Solomon explained to her children that she was going to talk with the officers. In the lobby, Officer Raskin motioned for Solomon to walk toward him. As Solomon was walking toward Officer Raskin, Officer Miller came up behind her, grabbed her arm, and attempted to leg sweep her. Solomon tripped but did not fall; when she regained her balance, she folded her arms across her chest. In response to Officer Miller's action, Solomon yelled, "Why are you doing this[?] I did not do anything." At this point, Officer Miller grabbed her left arm and Officer Raskin grabbed her right arm. The officers threw Solomon up against a wall and knocked her face into a display case. Solomon did not attempt to pull away from them and the Officers gave no directives to Solomon. Officer Raskin then handcuffed Solomon's right arm behind her back. Officer Miller pushed up against Solomon with his entire body weight, shoving his arm against her back and his leg in between hers. Solomon was pinned against the wall and could not move; her right arm was already handcuffed and her left arm was straight along her side. Without uttering any instruction to Solomon, Officer Miller forcibly bent her left arm behind her and "hear[d] a popping sound and her left arm [went] limp."

Solomon was subsequently taken to Pontiac Osteopathic Hospital, where she was diagnosed with a comminuted fracture of her left elbow; she also had several bruises from being thrown against the wall. Solomon was later charged with resisting arrest, assault on a police officer, and trespass. As part of a plea bargain, Solomon pleaded guilty to trespass and attempted resisting arrest.

HELD – The officers were sued for violating the subject's constitutional rights. The court upheld the lawsuit being brought. Qualified immunity will often operate "to protect officers from the sometimes 'hazy border between excessive and acceptable force.'" 'An officer should be entitled to qualified immunity if he made an objectively reasonable mistake as to the amount of force that was necessary under the circumstances with which he was faced. The facts here, however, do not present one of those hazy cases. The dissent ignores that the officers here were not faced with a tense and uncertain situation where they feared for their safety and the safety of bystanders. In fact, Solomon cooperated with the officers by leaving the movie theater. It was at that point that Officer Miller began to act with unnecessary, unjustifiable, and unreasonable force. He first attempted to leg sweep her when she was walking, *as instructed*, toward Officer Raskin. Officer Miller then shoved her into the display case, putting his entire weight--nearly twice the amount of her own weight--against her. Finally, without directing Solomon to act, he yanked her arm behind her with such force that it fractured. Officer Miller's actions, in total, were excessive and resulted in Solomon suffering from bruising and a fractured arm. In viewing the facts in favor of Solomon, we conclude that no reasonable officer would find that the circumstances surrounding the arrest of Solomon required the extreme use of force that was used here. Officer Miller is no exception. Because Officer Miller's conduct was unlawful under the circumstances, he is not able to escape liability through qualified immunity.

Add to page 18-33

“Knock & Talk” Consent searches

People v Bolduc C/A No. 244970 Aug. 24, 2004

After receiving a tip that defendant was storing marijuana at his residence officers conducted surveillance on defendant's residence for approximately two weeks. However, officers were unable to observe any activity that supported the tip. After the two weeks of surveillance Captain Compeau along with four other police officers went to defendant's residence to conduct a "knock and talk". Compeau and one other officer made contact with defendant at the front door of the residence at which time defendant admitted them into his residence. Compeau informed defendant that they were police officers and that they had received a tip that marijuana was stored at the residence. Although defendant did not deny that there was any marijuana at the residence he denied Compeau's request to search the residence. Further, defendant asked the officers to leave the residence. However, officers did not leave and began to question defendant about a large amount of money that Compeau had discovered in defendant's rear pocket. While Compeau could not articulate when he first observed the money he stated that he may have noticed it when he was conducting a pat-down search of defendant's person around the waist area for weapons "to protect myself" and because "it's good police procedure and safety". However, Compeau admitted that nothing from the

tip, his surveillance, or defendant's conduct at the residence gave him reason to suspect that defendant would be armed with a weapon.

When asked about the money defendant responded that he had sold a car that day for \$6,500 and he then officered to take Compeau to his car lot to verify the sale. Defendant rode to the car lot with Compeau, however once there he was unable to verify that he sold a car that day. Eventually, defendant admitted to having marijuana back at his residence and took the officers back to the residence, where he produced 3.7 pounds of marijuana from his freezer. Defendant then voluntarily went to the police station and, without being advised of his Miranda rights, defendant gave a tape-recorded statement and later signed a consent search form.

HELD: A "seizure" occurs when a police officer "by means of physical force or show of authority, has in some way restrained the liberty of a citizen." While police are free to employ the knock and talk procedure, they have no right to remain in a home without consent, absent some other particularized legal justification. A person is seized for purposes of the Fourth Amendment when the police fail to promptly leave the person's house following the person's request that they do so, absent a legal basis for the police to remain independent of the person's consent. The remaining question is whether the inherently coercive context in which defendant was seized entitles him to have his incriminating statements and the marijuana suppressed. Because this evidence resulted from the police officer's improper conduct in failing to leave when requested, they were properly suppressed as the fruit of the illegal seizure when the police officers failed to leave the house when defendant asked them to do so.

Add to page 18-35

Officers must possess reasonable suspicion to make an investigatory stop.

People v Dunbar, C/A No. 249623 (October 26, 2004)

The officer in this case received information from a reliable confidential informant that defendant was in possession of cocaine. The officer deemed the informant to be reliable because the informant had made purchases prior to this occasion at which time narcotics were obtained. The officer had been personally involved in at least three previous drug buys made by the informant. Based on the information, officers conducted surveillance in the area where the informant stated defendant would be. Officers observed the informant meet with defendant in front of a cellular phone store in this area. He testified that the pair went behind the store for a short period of time, and when they emerged together in front of the store again, each went their separate ways. The officer pulled his vehicle in front of defendant to block his path, and another officer, pulled behind defendant. The officer was in plain clothes, but had on a police undercover jacket which displayed a badge and the police logo. After the officer got out of his car, he announced that he was a police officer and asked defendant to remove his hands from his pockets as a safety precaution. The officer testified that he did not have his gun drawn and did not threaten defendant. When defendant removed only his right hand, the officer asked defendant to also remove his left hand. Defendant complied, holding his hands about shoulder height, and the officer observed a clear plastic baggie in defendant's left hand. The baggie appeared to contain multiple packages within it. As the officer approached defendant, he saw that the baggie contained green and white substances. The defendant dropped the bag and he was subsequently arrested.

HELD: Police officers may make a valid investigatory stop if they possess reasonable suspicion that crime is afoot. Reasonable suspicion entails something more than an inchoate or unparticularized suspicion or hunch, but less than the level of suspicion required for probable cause. In this case, the officer testified that the confidential informant was known to him and previously had been involved with at least three successful drug buys. Although details of the previous buys were not revealed, the officer's belief that the informant was reliable was a factor for the court to consider. Based on the informant's information that defendant had cocaine, the police went to the area where the informant stated defendant would be and observed defendant meet with the informant. The officer was familiar with defendant and recognized him as the person the informant stated had cocaine. The informant and defendant then went behind a building for a short period of time, reappeared, and went their separate ways. Based on these facts, we find that the trial court did not clearly err in concluding that there was sufficient indicia of reliability to provide the

police with reasonable suspicion that defendant had just been involved in criminal activity, which justified the forcible stop.

The defendant also argued that his arrest was also illegal. “Defendant was holding two clear plastic baggies in his left hand when he removed it from his pocket. The officer suspected they contained drugs because of the multiple individual packages within the bags. As he approached defendant, the officer noticed that the bags contained a green and a white substance that, based on his experience, he believed to be marijuana and cocaine. Based on these facts, the trial court did not clearly err in finding that probable cause existed to arrest defendant based on the officers reasonable belief that defendant was in possession of narcotics.”

Add to page 18-41
Handcuffing during Terry stops

U.S. v Foster 6th C/A No. 02-3859 (July 20, 2004)

Officers had been dispatched to a complaint of drug activity in an apartment complex. The officers had been in that particular area for complaints of drug activity that had resulted in an estimated eighty-five arrests for PCP. Upon arrival officers observed the defendant Foster emerge from a parked vehicle that was still running and walk towards a dumpster that was surrounded by a brick enclosure. Officers then made contact with Foster because in their experience drug traffickers would hide PCP in the dumpster area. Officers testified that upon contact with Foster they smelled PCP coming from his person. Officers asked Foster his name, some identification and reason for being there. Officers then testified that Foster appeared nervous throughout the encounter. At this point Foster asked to return to his vehicle, whereupon officers handcuffed Foster and conducted a pat down of his person for weapons. Officers testified that they did this because their experience people under the influence of PCP have a tendency to become violent, so they wanted to ensure that Foster was not armed.

Officers then brought Foster back to his vehicle due to the fact that he was only wearing a tee shirt and the weather was cold. Up until this point officers had never told Foster that he was under arrest. When officer's opened Foster's car door they were immediately hit with the smell of marijuana. Officers asked Foster if there was any marijuana in the vehicle, to which Foster responded that there was some located on the console and on the floor. As the officer leaned into the vehicle to retrieve the marijuana he noticed a gun and two vials of PCP. It was at this time that Foster was arrested and given his Miranda warnings.

HELD: The Initial Encounter: Law enforcement officers do not violate the 4th Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions or by putting questions to him if he is willing to listen.

The Terry Stop: the court concluded that the officers had reasonable suspicion to justify a *Terry* stop. Based upon the factors known to the officer at the time—that Foster smelled strongly of PCP, that he appeared nervous, that the area they were in was notorious for heavy drug trafficking, and that Higgins knew that drug traffickers would hide PCP in or near the apartment complex dumpsters—the court concluded that all of this amounted to reasonable suspicion such that the scope of the initial stop could properly be expanded. Because a *Terry* stop is justified by some objective manifestation that person stopped is, or is about to be, engaged in criminal activity the fact that Foster smelled of PCP, an illegal substance, alone warrants the officers detaining him to investigate further. Moreover, because an officer may conduct a *Terry* stop based on the reasonable inferences he may draw in light of his experience, the officer's eighty-five previous PCP-related arrests in that particular apartment complex are relevant experiences. Foster argued that once the police conducted a pat-down of his person any suspicion so as to justify further intrusion was eviscerated. However, the police were still entitled to determine whether he was indeed under the influence of PCP and the pat-down for weapons in no way either confirmed or dispelled that suspicion. Therefore, patting down the subject of a *Terry* stop does not signal the end of the detention, for law enforcement is permitted to investigate the circumstances that led them to stop the individual. A pat down for weapons is only part of the detention. To have simply sent Foster on his way, without further questioning at the very least, would have been plainly unreasonable, even inept, police work. We do not believe that officers overstepped the permissible bounds of the *Terry* doctrine by handcuffing Foster. The use of handcuffs does not exceed the bounds of a *Terry* stop so long as the circumstances warrant that precaution.

Add to page 18-47

Michigan adopts the good faith exception

People v Goldston, MSC No. 122364 (July 15, 2004)

“On September 23, 2001, twelve days after the terrorist attacks of September 11, 2001, police officers observed defendant collecting money on a street corner. He was wearing a shirt with the word "Fireman" written on it and holding a fireman's boot. He also carried a firefighter's helmet and jacket. Defendant told a police officer that he was collecting money for the firefighters in New York, but denied being a firefighter himself. The officers confiscated \$238 from defendant along with the firefighter paraphernalia, but did not immediately arrest him. Later, the officers successfully sought a search warrant for defendant's home. The warrant listed the address as "29440 Hazelwood, Inkster" and authorized the police to seize the following items: Police/Fire scanner(s) or radios, fire, EMS, Police equipment. Any and all emergency equipment, bank accounts, currency, donation type cans or containers, any and all other illegal contraband. The search uncovered more firefighter paraphernalia, a firearm, and marijuana. The prosecutor charged defendant with being a felon in possession of a firearm, MCL 750.224f; possession of a firearm during the attempt or commission of a felony, MCL 750.227b; two counts of possession of marijuana, MCL 333.7403(2)(d); and larceny by false pretenses, MCL 750.218.

Defendant filed a motion to suppress evidence, which the court granted. The court ruled that the search warrant affidavit did not connect the place to be searched with defendant and did not state the date that the police observed defendant soliciting money. The court thus concluded that the affidavit did not establish probable cause for the issuance of a warrant and dismissed the felon in possession, felony-firearm, and marijuana possession charges. The prosecutor appealed arguing that the police were acting in good faith when the items were seized.

HELD - We adopt the good-faith exception to the exclusionary rule in Michigan. The purpose of the rule, i.e., deterring police misconduct, would not be served by applying the exclusionary rule in this case because the police officers' good-faith reliance on the search warrant was objectively reasonable. Thus, the officers committed no wrong that exclusion of the evidence would deter. The police officers' reliance on the district judge's determination of probable cause and on the technical sufficiency of the search warrant was objectively reasonable. The information in the affidavit was not false or misleading, and the issuing judge did not 'wholly abandon' her judicial role. A review of the affidavit and search warrant can lead to no other logical conclusion than that the address listed was that of defendant. Indeed, it probably did not even occur to the magistrate or executing officers that the address was not defendant's address. Further, the affidavit was not 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'”

Application of the good faith standard

People v Hellstrom, C/A No. 252984 (October 21, 2004)

Defendant challenged the validity of the search of his house on the grounds that (1) the warrant(s) lacked probable cause, and (2) the warrant(s) constituted "general warrants" which allowed the police unfettered discretion to seize evidence. The original search warrant described the property to be searched and seized as follows:

* * *

2. The PROPERTY to be searched for and seized, if found is specifically described as: ANY AND ALL FORMS OF PORNOGRAPHY, TO INCLUDE BUT NOT LIMITED TO ALL COMPUTER GENERATED IMAGES AND FILES, PHOTOGRAPHS, DRAWINGS, VIDEOTAPES, FILM, PRINTED MATERIALS, ANY SEXUALLY EXPLICIT MATERIAL AND DEVICES. ALSO TO BE INCLUDED ALL COMPUTERS, CD'S, [SIC] DVD'S, [SIC] FLOPPY DISC[S] ALL CAMERA'S [SIC] AND CAMCORDERS, ANY AND ALL EQUIPMENT USED IN THE STORAGE, MANUFACTURING, GATHERING OR DISTRIBUTION OF SEXUALLY EXPLICIT MATERIAL. FURTHER[,] ANY PAPERWORK TO ESTABLISH OWNERSHIP OR RESIDENCE OF ALL

OCCUPANTS, AND ANY MAILING OR BILLING LISTS RELATED TO PORNOGRAPHY.

The affidavit to support the search warrant provided the following facts to establish probable cause:

* * *

3. The FACTS establishing probable cause or the grounds for search are:

- a) ON 03-05-03 DETECTIVE BERGERON RECEIVED TWO DIFFERENT COMPLAINTS ... OF A CRIMINAL SEXUAL CONDUCT AGAINST THE SUSPECT AT 30018 MANHATTAN, ST CLAIR SHORES, MICHIGAN, 48082.
- b) DETECTIVE BERGERON HAS BEEN A POLICE OFFICER FOR THE PAST 15 YEARS, HE IS CURRENTLY ASSIGNED TO THE INVESTIGATION BUREAU.
- c) THE NAMED SUSPECT IS A RESIDENT OF THE ADDRESS IN QUESTION.
- d) THERE ARE TWO DIFFERENT VICTIM'S [SIC] CLAIMING THAT THEY WERE BOTH SEXUALLY ASSAULTED BY THE SAME SUSPECT.
- e) THE VICTIM'S [SIC] ARE BOTH NEIGHBOR'S [SIC] TO THE SUSPECT AND HAVE BEEN ALONE WITH HIM AT 30018 MANHATTAN IN THE PAST.
- f) THE SEARCH OF THE ABOVE LISTED PREMISES SHOULD HELP TO FURTHER THIS INVESTIGATION.
- g) BASED ON MY EXPERIENCE AS A DETECTIVE INVESTIGATING SEXUAL ASSAULTS IT IS KNOWN THAT THIS ACTIVITY MAY ALSO LEAD TO THE USE OF PORNOGRAPHY FOR SEXUAL GRATIFICATION OF THE SUSPECT.
- h) IT IS ALSO KNOWN THAT CHILD SEXUAL ASSAULT PREDATORS ARE KNOWN TO HAVE ITEMS OF SEXUAL GRATIFICATION INSIDE THEIR HOMES, COMPUTERS AND OTHER DEVICES.

Several computers, videos, DVDs, CDs, and a camera were seized from defendant's home. However, the original search warrant did not authorize the police to look inside the computers that were taken from defendant's home. An amended search warrant was executed, which modified the type of property to be seized or searched, but did not alter the supporting facts in the affidavit. Subsequently, several images of pornographic material depicting children were found on at least one of the computers seized from defendant's home. In making its probable cause determination, the trial court took into consideration the affiant's experience as a police officer that items of a pornographic nature were often found in crimes of this type. The court concluded that there was more than a sufficient nexus between the affidavit, evidence, and area to be searched because (1) the defendant lived at the location, and (2) the complainants alleged that the offenses occurred at defendant's home. The court also held that the warrant was not overly broad under the circumstances because the electronic equipment and accessories identified to be seized all related to devices capable of recording or storing pornography. Accordingly, the court denied defendant's motion to suppress.

HELD – “We find that the officers conducting the search of defendant's home acted in good-faith reliance on the magistrate's probable cause and technical sufficiency determinations regarding the search warrants. The supporting affidavits were not ‘so lacking in indicia of probable cause’ as to say that the officers could not objectively believe that the warrant was supported by probable cause. And there is no reason to believe the facts alleged in the affidavit were false or that the magistrate was misled by false information. Also, although there were no allegations in the affidavit that defendant had videotaped or taken pictures of the complainants, it did assert that the crimes happened in defendant's residence. Given the affiant's knowledge that pedophiles generally possess pornographic images for sexual gratification, it was not ‘entirely unreasonable’ to believe that evidence of a crime would be found in defendant's home, whether it be images taken of the complainants without their knowledge or possession of other material that would constitute child pornography. Michigan's probable cause standard relates to whether ‘contraband or evidence of a crime will be found in a particular place.’ It does not require that the evidence sought be particular to the specific offense a defendant is alleged to have committed.”

Conviction for Failure to Pay Child Support does not violate Ex Post Facto Law if it is a Continuing Violation

People v Westman, C/A No. 243956 (May 27, 2004)

Subject failed to pay child support from July of 1993 until 2002. In 1999 the legislature amended the statute to make it a four-year felony for failure to pay child support. He was charged and convicted of the felony charge. He argued on appeal that his conviction violated constitutional right against the Ex Post Facto Clause. “We hold that MCL 750.165 does not violate the ex post facto prohibition as applied to defendant because defendant’s offense was a continuing offense that began and continued after the amendment’s effective date.”

People v Monaco, C/A No. 247383 (June 24, 2004)

The prosecutor brought felony non-support charges against defendant 8 and ½ years after his last payment for child support. The prosecutor argued that the defendant was \$57, 556 in total arrearage. During the 8 1/2 years the youngest child turned 18 years old when payments were no longer due. He argued that the charges should be dismissed because the statute of limitations had run and that the charges were barred by ex post facto because the felony charges were created by the legislature after his last alleged violation. The Court of Appeals disagreed.

HELD – The court held that failure to pay an arrearage is an ongoing violation and not subject to the statute of limitations. “We hold that a violation may be continuing under either the amount owed theory or the time ordered theory. Under the amount owed theory, the violation continues as long as an ordered support goes unpaid. For this reason, an amount owed violation may continue even beyond the child's eighteenth birthday. Under the at the time theory, the defendant violates MCL 750.165 when he or she fails to make the weekly support payment. The defendant also violates MCL 750.165 at the time each surcharge is added to the account and, at the same time, becomes due and owing.” On the basis of the decision that defendant's failure to pay the child support arrearage is an ongoing violation of 750.165, the court also concluded that a felony-nonsupport charge against defendant does not violate ex post facto prohibitions.

Stop and Identify statute upheld as constitutional

Hiibel v Humboldt County, SupCt No 03-5554 (June 21, 2004)

Officers received an afternoon telephone call reporting an assault. The caller reported seeing a man assault a woman in a red and silver GMC truck. An officer was dispatched to investigate. When the officer arrived at the scene, he found the truck parked on the side of the road. A man was standing by the truck, and a young woman was sitting inside it. The officer observed skid marks in the gravel behind the vehicle, leading him to believe it had come to a sudden stop. The officer approached the man and explained that he was investigating a report of a fight. The man appeared to be intoxicated. The officer asked him if he had any identification. The man refused and asked why the officer wanted to see identification. The officer responded that he was conducting an investigation and needed to see some identification. The unidentified man became agitated and insisted he had done nothing wrong. The officer explained that he wanted to find out who the man was and what he was doing there. After continued refusals to comply with the officer's request for identification, the man began to taunt the officer by placing his hands behind his back and telling the officer to arrest him and take him to jail. This routine kept up for several minutes and the officer asked for identification 11 times and was refused each time. After warning the man that he would be arrested if he continued to refuse to comply, the officer placed him under arrest. He was charged with resisting and violating the Nevada’s “stop and identify” law.

HELD – The Nevada statute stated the following:

Any peace officer may detain any person whom the officer encounters under circumstances that reasonably indicate that the person has committed, is committing or is about to commit a crime.

The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer.

The Court upheld the arrest. “The officer's request for identification was reasonably related to the circumstances justifying the Terry stop. The arrest for failure to comply with Nevada's ‘stop and identify’ law did not violate the Fourth Amendment’s prohibition against unreasonable searches and seizures. The officer's request was a common sense inquiry while investigating a possible domestic dispute involving a motorist. Also, defendant's conviction for refusal to identify himself did not violate his Fifth Amendment right against self-incrimination.”